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IN THE

Supreme Court of the United States

October Term, 1981

ARCO POLYMERS, INC.,

Petitioner,

v.

LOCAL 8-74, AFFILIATED WITH THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the court below misconstrue and misapply this Court's "Steelworkers Trilogy" decisions in ruling, contrary to six other circuits, that a uniform, undisputed past practice is irrelevant to whether a labor arbitration award draws its essence from the contract unless the practice is expressly accepted as valid by the other party?

2. Did the court below misconstrue and misapply *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960), in enforcing, contrary to five other circuits, an award which was unsupported by any principles of contract construction and inconsistent with the uniform past practice of the shop?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
1. The Labor Arbitrator's Award	3
2. The District Court Order Vacating the Award	5
3. The Court of Appeals Order Reversing the District Court	6
REASONS FOR GRANTING THE WRIT	8
1. The Third Circuit's Rejection of Past Practice as Irrelevant Conflicts With the Decisions of This Court and Six Other Courts of Appeals	8
a. Conflicts With the "Steelworkers Trilogy" Decisions of This Court	8
b. Conflicts With Decisions of Other Courts of Appeals	12
2. The Decision Below Conflicts With the Decisions of Five Other Courts of Appeals as to the Proper Standard of Review of Labor Arbitration Awards	14
a. The Other Circuits Have Uniformly Vacated Awards Which Are Contrary to the Plain Meaning of Contracts, to Principles of Contract Construction and to Past Practice	15
b. The Court Below Expressly Applied a Standard of Review Other Than That of *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960), Contrary to Every Circuit Which Has Ruled on the Issue	20

TABLE OF CONTENTS (Continued)

Page

3. The Decision Below Raises Significant and Recurring Problems Concerning Enforcement and Vacation of Labor Arbitration Awards Under Federal Law 22

a. The Ruling on Past Practice, if Permitted to Stand, Will Create Confusion and Injustice in the Application of the Most Important Source of Arbitral Law 22

b. The Enforcement of a Reinstatement Award Which Disregards the Plain Meaning of a Contract Casts Doubt on the Binding Nature of a Substantial Number of Collective Bargaining Agreements in All Industries 26

4. This Court Has Not Had Occasion to Address the Standard of Review of Arbitration Awards in Twenty-Two Years 27

CONCLUSION 28

APPENDIX A:

Court of Appeals Opinion A1

APPENNDIX B:

District Court Opinion A15

District Court Order A25

APPENDIX C:

Court of Appeals Judgment A27

Court of Appeals Order Denying Rehearing A29

APPENDIX D:

Decision of Arbitrator A31

APPENDIX E:

Excerpts From Union Contract A42

APPENDIX F:

Excerpts From Transcript of District Court Proceedings, April 1, 1981 ..... A49

TABLE OF AUTHORITIES

Cases:	Page
Aircraft Mechanics Fraternal Ass'n v. Ozark Air Lines, Inc., 598 F. 2d 1155 (8th Cir. 1979)	13
Albemarle Paper Co. v. Moody, 422 U. S. 405 (1975)	3
Amanda Bent Bolt Co. v. Int'l. Union, United Automobile Aerospace, Agricultural Implement Workers of America, Local 1549, 451 F. 2d 1277 (6th Cir. 1971)	16, 19
Boise Cascade Corp. v. United Steelworkers of America, 588 F. 2d 127 (5th Cir. 1979), *cert. denied* 444 U. S. 830	13
Brennan v. United Steelworkers of America, 501 F. Supp. 912 (W. D. Pa. 1980, *as amended*, 1981)	3
Campo Machinery Co. v. Local 1926, I. A. M., 536 F. 2d 330 (10th Cir. 1976)	18
I. A. M., District Lodge No. 50, Local Lodge No. 389 v. San Diego Marine Construction Corp., 620 F. 2d 736 (9th Cir. 1980)	18
International Brotherhood of Firemen and Oilers v. Nestle Co., 630 F. 2d 474 (6th Cir. 1980)	17, 19
Kewanee Machinery v. Local No. 21, I. B. T., 593 F. 2d 314 (8th Cir. 1979)	18
Mistletoe Express Service v. Motor Expressmen's Union, 566 F. 2d 692 (10th Cir. 1977)	17, 19
Monogahela Power Co. v. Local No. 2332, International Brotherhood of Electrical Workers, 566 F. 2d 1196 (4th Cir. 1976)	17, 20
Norfolk Shipbuilding and Drydock Corp. v. Local 684, International Brotherhood of Boilermakers, etc., 671 F. 2d 797 (4th Cir. 1982)	12
Safeway Stores v. American Bakery & Confectionary Workers Int'l, 390 F. 2d 79 (5th Cir. 1968)	13
Smith Steel Workers v. A. O. Smith Corp., 626 F. 2d 596 (7th Cir. 1980)	13
Textile Workers Union of America v. America Thread Co., 291 F. 2d 894 (4th Cir. 1961)	16

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Textile Workers Union v. Textile Paper Products, Inc., 405 F. 2d 397 (5th Cir. 1968) 13

Timkin Co. v. United Steelworkers of America, 492 F. 2d 1178 (6th Cir. 1974) 18

Timkin Co. v. Local No. 1123, United Steelworkers of America, 482 F. 2d 1012 (6th Cir. 1973), *cert. denied*, 414 U. S. 1004 .....9, 12, 16, 20

Torrington Co. v. Metal Products Workers Union Local 1645, 362 F. 2d 677 (2d Cir. 1966) 18, 19

Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co., 330 F. 2d 562 (8th Cir. 1964) 17

Union Employers Division of Printing Industry of Washington, D. C., Inc. v. Columbia Typographical Union No. 101, 353 F. Supp. 1348 (D. D. C. 1973) *affirmed without opinion*, 492 F. 2d 669 (D. C. Cir. 1974) 13

United Automobile, Aerospace and Agricultural Implement Workers v. T. R. W., Inc., 402 F. 2d 727 (6th Cir. 1968), *cert. denied*, 395 U. S. 910 17

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U. S. 593 (1960) .....i, 6, 8, 9, 10, 14, 15, 16, 17, 20, 21, 27, 28

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U. S. 574 (1960) 9, 10, 11, 12, 21, 22, 23, 27, 28

Yellow Cab Co. v. Democratic Union Organizing Committee, 395 F. 2d 735 (7th Cir. 1968), *cert. denied* 393 U. S. 1015 13

Statutes:

28 U. S. C. § 1254(1) 2

29 U. S. C. § 185(a) 2, 5, 22

TABLE OF AUTHORITIES (Continued)

Labor Arbitration Awards: Page

Baer Brothers, 16 LA 822 (Joseph F. Donnelly, 1951) 24

Bethlehem Steel Co., 33 LA 374 (Rolf Valtin, 1959) 25

Bonanza Air Lines, Inc., 44 LA 698 (Edgar Jones, Jr., 1965) 25

Metropolitan Coach Lines, 27 LA 376 (Melvin Lenard, 1956) 25

Owens-Corning Fiberglass Corp., 19 LA 57 (Jules Justin, 1952) 24

Miscellaneous:

2 BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 26

89 C. J. S. Trial § 649 3

Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959) 22

Elkouri & Elkouri, *How Arbitration Works* (3rd Ed. 1973) .. 27

Federal Mediation and Conciliation Service, *Thirty-Third Annual Report* (GPO, 1980) 27

Mittenthal, Richard, *Arbitration and Public Policy: Past Practice and Administration of Collective Bargaining Agreements*, from *Proceedings of 14th Annual Meeting of the National Academy of Arbitrators*, p. 30, 32 (BNA, 1961) 25

Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955) 23, 24

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LOCAL 8-74, AFFILIATED WITH THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner ARCO Polymers, Inc.[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 22, 1982.

1. On July 1, 1981, ARCO Polymers, Inc., a wholly owned subsidiary of Atlantic Richfield Company, ceased to exist as a corporate entity. Its operations and assets were on that date merged into the ARCO Chemical Company division of Atlantic Richfield Company.

OPINIONS BELOW

The opinion of the Court of Appeals, unofficially reported at 109 LRRM 3157, appears in Appendix A at pages A1-A14.[2] The opinion of the District Court for the Western District of Pennsylvania, which was reversed by the Court of Appeals, is reported at 517 F. Supp. 681 and appears in Appendix B, at pages A15-A24. The award of the arbitrator, which is the subject of this action, appears in Appendix D, at pages A31-A41.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 22, 1982. A timely petition for rehearing *en banc* was denied on March 18, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED

The statutory provision involved in this case is Section 301(a) of the Labor-Management Relations Act of 1947, 29 U. S. C. § 185(a), which provides as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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2. The pagination of the appendices will be sequential and cumulative. All page references will be abbreviated "A1," "A2," "A3," etc., regardless of which appendix contains the material cited.

STATEMENT OF THE CASE

1. The Labor Arbitrator's Award

On March 7, 1980, ARCO Polymers, Inc., the petitioner herein, discharged its employee Larry D. Anderson. The basis for the discharge was that Anderson's absences violated a collective agreement provision, Article XXVI, § B(1). That clause provided that "(e)mployees absent from work without good and sufficient cause for more than four (4) consecutive days shall be subject to discharge" (A32-33, 48). Thereafter, the matter was processed by Mr. Anderson's union through the grievance procedure to arbitration before Arbitrator Robert Wagner (A33).

The arbitrator's award, issued on June 18, 1980, expressly found that Mr. Anderson had been absent from work for 19 days from February 6 to 25, 1980, without "'good and sufficient' cause for his absence" (A39; see also A19, A23).[3] Immediately after this finding the arbitrator

3. The Court of Appeals "assume(d) without deciding, that the district court correctly concluded that the Arbitrator found that Anderson was absent for nineteen days without cause." (A5). The Union's argument on this point had been, essentially, that the arbitrator secretly could have reversed his above-described express finding at a later juncture and secretly could have found that Anderson had "cause for his absence." The Company countered by arguing, *inter alia*, that a finding "will not be implied when such implied finding would conflict with an express finding" 89 C. J. S. *Trial* § 649; that the arbitrator's only references to Mr. Anderson's alleged "illness" were speculative, conjectural or simply negative comments which could not support an implied, contrary finding of fact in our intellectually honest judicial system (*Albemarle Paper Co. v. Moody*, 422 U. S. 405, 441 (1975) (Marshal J., concurring); *Brennan v. United Steelworkers*, 501 F. Supp. 912, 925 (W. D. Pa. 1980, as amended, 1981)); and that the only post-February 25 evidence was the statement by *Anderson's* doctor on March 7 that "[t]here has been no reason why the patient could not have been at work" (A37).

set forth his bases therefor, consisting of the following express rejections of each of Anderson's excuses: Anderson's reliance on a February 8 slip allegedly from a local hospital, because "that hospital had no such account number" as appeared on the slip (A39); his reliance on a February 15 doctor's note, because "[i]t did not indicate that he had been ill since that date, or between February 8 and 25" (A39); and his claim of combined knee problems and influenza illness, because the examining doctor on February 25 found "nothing disabling in his knees or any observable signs of influenza on that date" and because "a common attack of influenza would not have disabled Anderson from February 5, 1980, to February 25, 1980" (A39, 40). The arbitrator also observed that Anderson's absence record "did not improve even after he had been given 3-day and 5-day suspensions in 1979" (A39).

The arbitrator further found that the uniform, 11-year past practice was to discharge every employee who violated the above-described contract clause; that the Company sent "discharge letters" [4] relying "solely upon Article XXVI, B(1)" to every one of the 20 employees who had violated this provision in successive contracts since December, 1968 (A39-40). The Union did not dispute the existence of this practice in its contentions before the arbitrator (A37-38).

In his Opinion the arbitrator's only mention of a contract provision other than the above-described Article XXVI, was the following single reference to the earlier general "just cause" clause, Article XVI, § J:

> On the question of "just cause" for discharge the Company's post hearing brief lists three known Arbi-

4. The contract provides in Article XVI, § J(2) for "notification of such discharge[s] by the Company in writing to the Union" (A46; see also A50).

> trators who agree with the Company that a specific provision, such as we have here on absenteeism, takes precedence over a general provision, i.e., Art. XVI, J(3) *or* [sic] *the Arbitrators' Wolff, Ray or Kelliher decisions cited in the Union's post hearing brief.*[5]

At this point the arbitrator abruptly ended his discussion of this matter without any finding of conflict between the two clauses.

The arbitrator's award ordered that Mr. Anderson be reinstated without back pay (A41).

2. The District Court Order Vacating the Award

Petitioner timely commenced suit in the United States District Court for the Western District of Pennsylvania to vacate the award under 29 U. S. C. § 185(a). Respondent cross-petitioned for enforcement and back pay. In addition to the facts found by the arbitrator, the District Court found that Article XVI, § H(1) of the Agreement (A46) provided that "[t]he arbitration procedure shall not be used to change or modify this Agreement in any respect" (A16). The District Court held, *inter alia*, that in ordering reinstatement the arbitrator was "clearly in excess of his authority under Article XVI, Section H1. of the Agreement when he proceeded to modify [the Agreement] by nullifying the specific, unambiguous, contractual right of

5. A40 (Emphasis added.) The italicized portion of the above passage may lead this Court to infer that the Wolff, Ray and Kelliher decisions dealt in some way with the Company's claim that the specific clause limited the meaning of the general "just cause" provision. Such an inference would be mistaken. The *arbitrator* in his summary of the Union's contentions (A38) found that the Union cited the arbitration decisions on the issue of *which party bore the burden of proof*—not on the question of whether a general clause supersedes a conflicting specific clause or *any* issue of contract construction.

the [petitioner] to discharge an employee who had been absent for more than four (4) days without 'good and sufficient cause'" (A22); that in view of the arbitrator's finding of a uniform 11-year practice of discharging employees for violation of Article XXVI, § B(1), "there is no basis . . . from which one properly could infer any 'relaxation of the literal language' of that provision" (A20); that a ruling by the arbitrator that the general "just cause" provision supersedes Article XXVI, § B(1) "would have been 'totally unsupported by principles of contract construction' . . . since . . . it is a well established rule of contract construction that 'a subsequent specification [Article XXVI, § B(1)] impliedly limits the meaning of a preceding generalization [Article XVI, § J(1)]'" (A21, note 2); and that because the award is "a gross non-sequitur and a classic example of an arbitrator dispensing 'his own brand of industrial justice'", the award does not "'draw its essence from the collective bargaining agreement' *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 US 593 (1960), and must be vacated" (A23-24).

3. The Court of Appeals Order Reversing the District Court

The Court of Appeals for the Third Circuit reversed the District Court on the basis that the arbitrator could rationally have found that the prior general "just cause" provision "supersedes" the specific subsequent clause on absences (A9-10 and A11, note 3), ruling, in short, that the arbitrator's "failure to apply correct contract principles is irrelevant" (A13) and that the uniform past practice could only have relevance "if the Company could show that it was a uniform past practice accepted by the Union to discharge all employees who have been found absent for more than four days without good and sufficient cause" (A14).

REASONS FOR GRANTING THE WRIT

1. The Third Circuit's Rejection of Past Practice as Irrelevant Conflicts With the Decisions of This Court and Six Other Courts of Appeals

This Court in its "Steelworkers Trilogy" decisions established that past practice is an important source of law in grievance and arbitration handling. The court below has not only re-defined the concept of past practice into a formalized agreement, but also has in effect held that in absence of such agreement, even a *uniform* past practice is *irrelevant* because it is not part of the collective bargaining agreement. This ruling is contrary to this Court's decisions, to every other Circuit which has ruled on the matter, to the weight of authority among arbitrators, and to the national labor policy.

a. Conflicts With the "Steelworkers Trilogy" Decisions of This Court

In rejecting the uniform, undisputed practice at issue herein the decision below first seeks to segregate (i) the requirement that an *arbitrator* look to past practice as a "source of law" from (ii) a *court's* inquiry under *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U. S. 593, 597 (1960), into whether an award "draws its essence from the collective bargaining agreement." The Third Circuit then ruled, as set forth below, that the *very practice at issue here* is valid for purposes of arbitration, but irrelevant to the *court's* inquiry in (ii):

> The Company argues that its uniform past practice . . . is an independent ground for vacating the award. There is no doubt that such a practice is relevant to the question facing the arbitrator, see

> *Warrior & Gulf*, 363 U. S. at 581-82 [quoting one portion of this Court's reference to past practice, but omitting the portion which holds that past practice is "a part of the collective bargaining agreement"]. . . . We do not, however, think it is relevant to the question before this Court: whether the arbitrator's award draws its essence from the contract.[6] *But see Timken Co. v. Local 1123, United Steelworkers*, 482 F. 2d 1012, 1014 (6th Cir. 1973) (Vacating an arbitration award where arbitrator's award was contrary to shop practices). (A14).

This amounts to a ruling that the past practice relied upon herein by Petitioner is "no doubt" a valid one under *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960), but does not become part of the labor agreement for purposes of the *Enterprise* test. This is in direct conflict with both of this Court's decisions. In *Warrior & Gulf* this Court held precisely to the contrary, as follows:

> The labor arbitrator's *source of law* is not confined to the express provisions of the contract, as the *industrial common law*—the practices of the industry and the shop—*is equally a part of the collective bargaining agreement* although not expressed in it. 363 U. S. at 580-81 (Emphasis added.)

If past practice is "a part of the collective bargaining agreement" and a "source of law" for the arbitrator, it cannot possibly be irrelevant to the question under *Enter-*

6. This refusal to apply *Warrior & Gulf* in a court proceeding to vacate an award for purposes of the past practice issue is inconsistent with the Third Circuit's earlier application of a *contract* provision from the *agreement* before this Court in *Warrior & Gulf* [that "matters which are strictly a function of management shall not be subject to arbitration"] as the *substantive standard of review in this case* (A9). See also Item 2b, *infra*.

prise of whether an award "draws its essence from the collective bargaining agreement."

This Court's decision in *Enterprise*, even when read in isolation from the above passage of *Warrior & Gulf*, cannot be construed to eliminate past practice as being a source of law binding on arbitrators. This Court in *Enterprise* characterized the role of arbitrators to include consideration of past practice:

> As we stated in United Steelworkers of America v. Warrior & Gulf Navigation Co., decided this day, the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements. 363 U. S. at 596.

Accordingly, the Third Circuit's ruling herein that past practice is not a part of the collective bargaining agreement for purposes of determining whether an award "draws its essence from the collective bargaining agreement" is in direct conflict with *Warrior & Gulf* and *Enterprise* for this reason alone.

The second conflict between the decision below and this Court's "Steelworkers Trilogy" relates to the Third Circuit's ruling, in effect, that proof of past practice requires evidence of *express agreement* by the parties to the practice before it will have relevance in a suit to vacate or enforce an award.

The Third Circuit was presented with a uniform undisputed 11-year practice by Petitioner of discharging all employees who violated Article XXVI, § B(1) with notice to the Union. (See *supra*, p. 4, note 4 and accompanying text). It ruled that the practice was irrelevant in this

suit unless the Company could prove that it was "accepted by the Union to discharge all employees who have been found absent for more than four days without good and sufficient cause" (A-14). In plain English, therefore, a practice is irrelevant in the Third Circuit unless the other party—union or employer—*expressly* accepts the practice as valid. The ruling of the court below can have no other meaning in view of the fact that it was made on a record which contained no evidence of any Union disagreement with 20 successive discharges spanning over a decade of successive labor contracts. Moreover, this construction of the ruling is consistent with the Third Circuit's earlier ruling that past practice is relevant to an *arbitrator* under *Warrior & Gulf*, but not to a *court* on the issue of whether an award "draws its essence from the collective bargaining agreement" under *Enterprise*.

The Third Circuit's unique requirement of active, actual "acceptance" of a practice as valid directly conflicts with this Court's decision in *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra.* This Court there held, in pertinent part, that the law which binds an arbitrator includes practices of the shop and industry which *may not even be known* to the negotiators of a contract—to say nothing of formal "acceptance" by the negotiators:

> Gaps [in the contract] may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. *Many of the specific practices* which underlie the agreement *may be unknown*, except in hazy form, even to the negotiators. 363 U. S. at 581-82. (Emphasis added.)

A party can hardly be shown to have expressly accepted the validity of a practice which was *unknown* to

that party. Thus, the Third Circuit's ruling that a practice must be "accepted" in order to be valid is in direct conflict with this Court's holding in *Warrior & Gulf*.

b. Conflicts With Decisions of Other Courts of Appeals

The Third Circuit's ruling is also in conflict with six other Circuits which have applied the "industrial common law" under *Warrior & Gulf* without evidence of express acceptance or knowledge in suits to vacate or enforce awards.

In its instant opinion the Third Circuit conceded that its ruling on this point was contrary to the Sixth Circuit's decision in *Timken Co. v. Local 1123, United Steelworkers of America*, 482 F. 2d 1012, 1014 (1973), *cert. denied*, 414 U. S. 1004. The Sixth Circuit there vacated an award which had ordered reinstatement of a jailed employee. The court's ruling in *Timken* was based on the fact that the award was not only contrary to the language of the agreement, as here, but also contrary to "a consistent policy [by the Company] of categorcially denying authorized absences to employees confined to jail." The Sixth Circuit did *not* refer to or examine any evidence of "acceptance by the union." Nor did it find that union officials even *knew* of that policy.

Also in direct conflict with the Third Circuit's ruling herein, and precisely in point on its facts, is a recent Fourth Circuit decision vacating and remanding a district court order in a suit to set aside an arbitration award. *Norfolk Shipbuilding and Drydock Corp. v. Local 684, International Brotherhood of Boilermakers, etc.*, 671 F. 2d 797 (1982). The basis for the remand in *Norfolk Shipbuilding* was that the district court had refused to admit evidence of and consider as the "common law of the shop" a *unilateral, employer* past practice of assessing dis-

ciplinary penalties other than discharge for employee refusals of overtime work.

In suits to enforce awards, the Fifth and Seventh Circuits have considered entirely unilateral past practices relevant, without any requirement or evidence of acceptance by the other contractual party. *Smith Steel Workers v. A. O. Smith Corp.*, 626 F. 2d 596, 598 (7th Cir. 1980) ("a consistent Company practice of imposing . . . discharge for possession of alcoholic beverages."); *Boise Cascade Corp. v. United Steelworkers of America*, 588 F. 2d 127, 128 (5th Cir. 1979), *cert. denied*, 444 U. S. 830 (employer's past practices); *Textile Workers Union v. Textile Paper Products, Inc.*, 405 F. 2d 397, 398 (5th Cir. 1968) (employer's 11-month practice of computing compensation); *Yellow Cab Co. v. Democratic Union Organizing Committee*, 398 F. 2d 735, 736, 737 (7th Cir. 1968), *cert. denied*, 393 U. S. 1015 (the employer "had not previously enforced" a procedural requirement); *Safeway Stores v. American Bakery & Confectionary Workers Int'l*, 390 F. 2d 79, 83 (5th Cir. 1968) ("[e]mployer's long practice of wage payment . . . ."). Indeed, the Eighth and District of Columbia Circuits have relied on *industry* practice without any requirement of prior acceptance by *either party* to the contract. *Aircraft Mechanics Fraternal Ass'n. v. Ozark Air Lines, Inc.*, 597 F. 2d 1155 (8th Cir. 1979); *Union Employers Division of Printing Industry of Washington, D. C., Inc. v. Columbia Typographical Union No. 101*, 353 F. Supp. 1348 (D. D. C. 1973) *affirmed without opinion*, 492 F. 2d 669 (D. C. Cir. 1974).

These conflicts justify the grant of certiorari to review the judgment below.

2. The Decision Below Conflicts With the Decisions of Five Other Courts of Appeals as to the Proper Standard of Review of Labor Arbitration Awards

In *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U. S. 593, 597 (1960), this Court held that:

> Nevertheless, an arbitrator is confined to interpretation of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Applying the *Enterprise* decision, the Second, Fourth, Sixth, Eighth and Tenth Circuits have vacated awards which disregarded clear, negotiated contract language and/or went beyond the terms of the respective contracts. Most of such decisions were on facts substantially indistinguishable from those presented to the Third Circuit herein. All but one of those decisions relied on contract provisions, nearly identical to Article XVI, § H herein, which prohibited modification of the respective contracts by the arbitrator. Yet, contrary to *Enterprise*, and to every Circuit which has ruled on the issue, the Third Circuit herein *enforced* such an award, ruling principles of construction irrelevant and expressly applying a different legal standard of review than that set forth in *Enterprise*.

a. The Other Circuits Have Uniformly Vacated Awards Which Are Contrary to the Plain Meaning of Contracts, to Principles of Contract Construction and to Past Practice

In reliance upon what it conceived to be a proper application of *Enterprise* the Third Circuit has here ruled that an award must be upheld even where it is contrary to the plain meaning of the contract, to established principles of contract construction, and to a uniform past practice. In fact, the decision below held that considerations of correct principles of contract construction and of past practice are not *relevant* in proceedings to review an arbitration award. Rather, the award will be enforced so long as the arbitrator's award "permits the inference" that he considered the general "just cause" and the specific discharge for absence clauses to be in conflict and that he decided that the general clause superseded the specific clause (A10-11). The Court also stated that it is possible that the phrase "shall be subject to discharge," suggested to the arbitrator that Article XXVI, § B(1) was "non-mandatory" (A10).

In so holding the Third Circuit in effect conceded that its ruling was contrary to decisions vacating awards on similar facts in the Fourth, Sixth, and Eighth Circuits. In a footnote to its opinion the Third Circuit assumed that the cases from those circuits "stand for the proposition for which they are cited" and "that our case is not distinguishable . . . ." (A11, note 3). Yet, the Third Circuit reversed the District Court order which had vacated the subject award.

In similar cases the circuits mentioned above, as well as the Tenth Circuit, have ruled that an award which, as here, disregards a subsequent specific discharge provision in favor of a prior general requirement for "just cause," or

the like, is unsupported by principles of contract construction and, in absence of a clear supporting past practice, must be vacated under *Enterprise*.

The Sixth Circuit has vacated several awards in circumstances nearly identical to those presented herein. In *Amanda Bent Bolt Co. v. International Union, United Automobile, Aerospace, Agricultural Implement Workers of America, Local 1549*, 451 F. 2d 1277, 1279-1280 (1971), the Sixth Circuit vacated an award which had ruled that a prior general clause requiring "cause" for discharge superseded a subsequent, specific provision stating that violation of the no-strike clause "may be made the subject of disciplinary action, including discharge." The award was set aside on the basis that it was contrary to the latter specific provision and, therefore, failed to "draw its essence from the collective bargaining agreement" under *Enterprise*. Another similar Sixth Circuit decision was *Timken Co. v. Local Union No. 1123, United Steelworkers of America, supra*. There, again, the arbiter applied the general discharge clause to order reinstatement of a jailed employee who had been absent for over seven days without authorization. The Sixth Circuit vacated the award as being inconsistent with (i) a subsequent specific provision that an "unauthorized absence of seven (7) consecutive days shall be considered a voluntary quit," and (ii) a uniform employer past practice.

The Fourth Circuit vacated a reinstatement award in similar circumstances in *Textile Workers Union of America v. American Thread Co.*, 291 F. 2d 894, 898-899 (1961). There the arbitrator had ruled that a provision expressly permitting discharge for failure to perform work in accordance with employer standards did *not* mean that the arbitrator was "foreclosed from inquiring in this case whether just cause for discharge . . . existed" under the earlier general "just cause" clause of the agreement. The

Fourth Circuit vacated that award based on its view that this Court in *Enterprise* and other cases did not intend to compel enforcement of awards "which do such violence to the clear, plain, exact and unambiguous terms of the submission and the contract of the contending parties." *Id.* at 899.

Similarly, the Eighth Circuit in *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F. 2d 562, 563-564 (8th Cir. 1964), vacated an award which had ordered reinstatement of an employee based on a finding that discharge was an "excessive penalty" under a general discharge for "proper cause" clause. This, despite the employee's admitted violation of a specific subsequent contractual provision that "dishonesty . . . shall be grounds for discharge." The Eighth Circuit there ruled that *Enterprise* means that the arbitrator's authority for the award "must be found within the terms or meaning of the agreement between the parties" and that the agreement presented there, including the requirement that discharge be for "proper cause," did not give the arbitrator the authority to reinstate the grievant. *Id.* at 565-566. Subsequent decisions of the Fourth and Sixth Circuits are to the same effect: *United Automobile, Aerospace and Agricultural Implement Workers v. T. R. W., Inc.*, 402 F. 2d 727 (6th Cir. 1968) *cert. denied* 395 U. S. 910; *Monongahela Power Co. v. Local No. 2332, International Brotherhood of Electrical Workers*, 566 F. 2d 1196 (4th Cir. 1976); *International Brotherhood of Firemen and Oilers v. Nestle Co.*, 630 F. 2d 474 (6th Cir. 1980).

The Tenth Circuit has followed the lead of the Sixth and Eighth Circuits in reading *Enterprise* in a manner inconsistent with the court below. *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F. 2d 692 (10th Cir. 1977), is still another case where the arbitrator expressly relied on a general "just cause" clause to reinstate an em-

ployee, despite the employee's violation of a subsequent, specific discharge provision. The specific clause there provided that employees may be discharged for failure to settle bills within 24 hours. The Tenth Circuit vacated the award because "[t]he arbitrator may not rewrite the labor contract." *Id.* at 695.[7]

In a broader sense the decision below also conflicts with a decision of the Second Circuit vacating an award

7. While implicitly conceding that its decision conflicted with the above line of cases, the Third Circuit stated in its opinion that its analysis was "net without case support," citing four appellate cases for the proposition that in discharge cases arbitrators may resolve conflicts in contract language (A11-12). Two of the cases cited enforced awards which merely ruled that *contractual* discharge "for cause" provisions supersede *noncontractual* plant rules. *Campo Machinery Co. v. Local 1926, I. A. M.*, 536 F. 2d 330 (10th Cir. 1976); *Timken Co. v. United Steelworkers of America*, 492 F. 2d 1178 (6th Cir. 1974). Another case involved enforcement of an award which did no more than apply a general "just cause" provision to a set of facts under a contract which did not contain any specific discharge provision. *I. A. M., District Lodge No. 50, Local Lodge No. 389 v. San Diego Marine Construction Corp.*, 620 F. 2d 736 (9th Cir. 1980). The fourth case relied upon by the Third Circuit, *Kewanee Machinery v. Local No. 21, I. B. T.*, 593 F. 2d 314 (8th Cir. 1979), is actually, on close analysis, *inconsistent* with its decision in this case. *Kewanee* enforced an award which, again, held that a *contractual* "proper cause" clause superseded a *noncontractual* shop rule. *Kewanee* also involved a conflict between a prior *general* provision that the employer had the right to "discharge employees" and a subsequent *specific* provision that discharge of employees was to be "for proper cause." The Eighth Circuit ruling that the arbitrator could have construed the *latter* provision to supersede the *former* is entirely consistent with *Enterprise* and with the established principle of contract construction that a subsequent specification limits a prior generalization. Insofar as the Third Circuit relied on *Kewanee* as being "case support" for its analysis herein, we submit that *Kewanee* provides no such support. The Third Circuit's ruling herein not only refuses to apply the above principle of contract construction, but also rules that correct contract construction is "irrelevant."

in a non-disciplinary matter. *Torrington Co. v. Metal Products Workers Union Local 1645*, 362 F. 2d 677 (2d Cir. 1966). The court in *Torrington* vacated the award because it went beyond the terms of the contract in violation of a contract provision, similar to Article XVI, § H herein (A46), which clause prohibited the arbitrator from adding to or modifying the terms of the agreement.

In addition to the above conflicts the "suggestion" by the Third Circuit that Article XXVI, § B(1) could properly have been disregarded by the arbitrator as "nonmandatory" (A10) is in direct conflict with certain decisions of the Sixth and Tenth Circuits and implicitly in conflict with the other above-cited decisions in discharge cases. In this respect, the court below conceded (A10) that its ruling conflicted with that of the Tenth Circuit on the substantially identical contract language presented in *Mistletoe, supra*, 566 F. 2d at 695 (the allegedly nonmandatory term, "may be discharged," created no ambiguity permitting reinstatement; rather, it "gives the employer the option to discharge or not"). Moreover, the Sixth Circuit vacated an award which had reinstated an insubordinate worker because the award conflicted with a contract provision that "insubordination . . . shall constitute cause," notwithstanding the fact that thereunder the employer "was not *required* to discharge the employee . . ." *International Brotherhood of Firemen v. Nestle Co., Inc., supra* 630 F. 2d at 477 (emphasis added). Of the six remaining decisions in which the Fourth, Sixth and Eighth Circuits set aside reinstatement awards as being contrary to the plain meaning of the respective contracts, *not a single case involved mandatory contract language requiring the employer to discharge employees who violated the respective clauses.*[8]

8. For example, the clause in *Amanda Bent Bolt, supra*, was *less mandatory* than the subject clause. It provided that violation of the no-strike clause "*may* be made the subject of discipline, in-

b. The Court Below Expressly Applied a Standard of Review Other Than That of *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U. S. 595 (1960), Contrary to Every Circuit Which Has Ruled on the Issue

In determining whether the instant collective bargaining agreement prohibited the arbitrator from reinstating Mr. Anderson the district court applied the *Enterprise* tests of whether the arbitrator was dispensing "his own brand of industrial justice" and whether his award "drew its essence from the collective bargaining agreement." (A23-24). However, in the critical portion of its opinion on this issue the Third Circuit failed to apply the *Enterprise* test, contrary not only to the district court, but also to every Circuit which has ruled on the matter. The pertinent passage is as follows:

> The Union recognizes that article XXVI, section B(1) specifically provides that the absence of an employee without good and sufficient cause for more than four days subjects an employee to discharge. It cannot be said with absolute certainty, however, that discharge under this section is "strictly a function of management." *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 584 (1960) (interpreting term "strictly a function of management" as "refering only to that over which the contract gives management complete control and unfettered discre-

8. (Cont'd.)

cluding discharge." (Emphasis added.) Other clauses provided that specific misconduct would be grounds for or "cause" for discharge or, in *Monogahela Power*, that the employer would have "the unqualified right to discharge" wildcat strikers. The only such decision which involved arguably "mandatory" language was *Timken, supra*, 482 F. 2d 1012, which provided that an unauthorized absence "shall be considered a voluntary quit."

> tion"). The arbitrator's award permits the inference that he considered whether discharge under article XXVI, section B(1) is *strictly a function of management* once it is found that the employee was absent without good and sufficient cause or whether the arbitrator has the authority, based upon article XVI, section J(1) to reinstate an employee upon a finding that the employee was not discharged for just cause (A9) (Emphasis added.)

The application of the standard, "strictly a function of management," is not only in conflict with the universal application of the *Enterprise* test, but also is a misapplication of the *Warrior & Gulf* test for arbitrability. The term, "strictly a function of management," was a *provision of the contractual grievance procedure which was at issue in Warrior & Gulf.* The full clause from the negotiated agreement between the parties therein provided as follows:

> Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section. 363 U. S. at 576.

The standard for determining arbitrability established in that case was as follows:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. 363 U. S. at 582-583.

This Court there interpreted the *contractual* clause, "strictly a function of management," solely for the purpose

of determining arbitrability under the above standard. In no way did this Court in *Warrior & Gulf* purport to announce a principle, rule or standard that the lower courts should apply that *contract clause* as a standard of review for *awards*, or even as a standard for determining *arbitrability*.

The above conflicts justify the grant of certiorari to review the judgment below.

3. The Decision Below Raises Significant and Recurring Problems Concerning Enforcement and Vacation of Labor Arbitration Awards Under Federal Law

The Third Circuit's opinion in this case involves important policy considerations in enforcing and vacating arbitration awards under Section 301 of the Labor Management Relations Act.

a. The Ruling on Past Practice, if Permitted to Stand, Will Create Confusion and Injustice in the Application of the Most Important Source of Arbitral Law

With respect to the Third Circuit's ruling that past practice is irrelevant unless expressly accepted by the parties, the problem faced by litigants, lower courts and arbitrators is critical. Past practice is a consideration in nearly all grievance and arbitration proceedings with respect to most provisions contained in collective bargaining agreements. Indeed, Archibald Cox in his now-famous article which was relied upon by this Court in *Warrior & Gulf* stated that among an arbitrator's sources of law, "[p]erhaps past practice is the most significant . . . ." Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1500 (1959).

In order to assess the impact of the Third Circuit's ruling on this most critical factor in day-to-day labor re-

lations, we submit that the Court should visualize the typical scenario at the average American plant, store, office or other union-represented facility: The parties have negotiated contracts in which "gaps may be left to be filled in by reference to the practices of the . . . various shops covered," many of which practices "may be unknown . . . even to the negotiators." (See *Warrior & Gulf, supra*, 363 U. S. at 580-81, quoting and summarizing from Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1005 (1955)). The parties leave those "gaps" and uncertainties because otherwise *they would not be able to avoid a strike.* In Dean Shulman's words:

> . . . I venture to guess that in many enterprises the execution of a collective agreement would be blocked if it were insisted that it contain a broad provision that "all existing practices, except as modified by this agreement, shall be continued for the life thereof unless changed by mutual consent." And I suppose that execution would also be blocked if the converse provision were demanded . . . . The reasons for the block would be, of course, the great uncertainty as to the nature and extent of the commitme... . . . . Shulman, *supra*, at 1005.

The main purpose of the grievance procedure is to fill the "gaps" on which negotiators could never agree. And the filling of these gaps is usually done at the lowest levels of the union and employer structures on an informal, day-to-day basis by *conduct*—not by "agreement." To require express agreement of the parties for a binding practice, therefore, destroys the utility of the grievance procedure. Its natural effect is to force issues to the higher-level, adversary relationship of union/employer officers and man-

agers. We submit that in the typical union-represented plant the national labor policy's goal of industrial peace is enhanced by *not* requiring the parties to reach express agreement on past practices, because to require it will generate increased economic warfare. In day-to-day labor relations, it is no more likely that a union steward or officer will "agree" that an employer practice is valid than is the converse. And it is no more likely today than it was in Dean Shulman's day that contract negotiators will be able to agree on which practices, *if any,* are valid.

Finally, the confusion and injustice which will be caused by the Third Circuit's ruling herein is further demonstrated by the many renowned arbitrators who over many years have repeatedly ruled that binding past practices need not be expressly agreed to or, in cases very similar to the instant case, consciously *known* to officials of the other party. Generally a mere absence of protest over a long period of time, as in the instant case, suffices to establish a binding practice. By way of example, we refer the Court to the following arbitrators:

Jules Justin—past practice is binding where "[t]he Union knew or reasonably should have known of the Company's practice." *Owens-Corning Fiberglass Corp.*, 19 LA 57, 63 (1952);

Joseph F. Donnelly—

> The claim of the Union that it did not know that the Company was not paying the shift bonus is not strongly persuasive . . . in the absence of any protest over this long period of time [1948-1951] it must be presumed that both the Union and the Company considered that the provisions of the Agreement were being carried out. *Baer Brothers,* 16 LA 822, 824 (1951);

Melvin Lenard—a long-standing practice

> must be presumed (in the absence of any contra evidence) to have been known to responsible [Union] officials, and their failure to protest over these many years effects a binding assent to the contractual validity of the practices. *Metropolitan Coach Lines*, 27 LA 376, 383 (1956).

Rolf Valtin—a practice "need not be accompanied by *express* consent or agreement on the part of Supervision," but may be shown by mere *awareness* of the practice; where a practice is long-standing and widespread "Supervision's awareness—even if not directly proved—reasonably must be presumed." *Bethlehem Steel Co.*, 33 LA 374, 375-376 (1959).

Edgar A. Jones, Jr.—Acceptance of a practice

> . . . is evidenced by knowledge of the unprovided for conduct, and by its existence as a pattern of conduct over a significant period of time. In this case the Company's practice . . . extended over a number of years, and involved a sufficiently large number of employees as to compel the conclusion that the predecessor union must be taken to have been aware of it. *Bonanza Air Lines, Inc.*, 44 LA 698, 700 (1965) (emphasis added.)

Richard Mittenthal—"Acceptability"—not "acceptance"—is required for a binding practice.

> Such acceptability may frequently be implied from long acquiescence in a known course of conduct. Where this acquiescence does not exist, *that is, where the employees have constantly protested a particular course of action through complaints and grievances*, it is doubtful that any practice has been created. *Arbitration and Public*

Policy: Past Practice and Administration of Collective Bargaining Agreements, 14th Annual Meeting, National Academy of Arbitrators, p. 30, 32 (BNA, 1961) (Emphasis added.)

b. The Enforcement of a Reinstatement Award Which Disregards the Plain Meaning of a Contract Casts Doubt on the Binding Nature of a Substantial Number of Collective Bargaining Agreements in All Industries

The same pervasive and recurring uncertainty results from the Third Circuit's enforcement of an award which conflicts with a clearly reserved management right to discharge employees for specific misconduct. According to a survey by the Bureau of National Affairs of collective bargaining agreements in a representative cross-section of industries, geographical areas, unions and number of employees covered, 80% of the agreements contained general "cause" or "just cause" provisions respecting discharge and 65% of the agreements contained clauses establishing specific grounds for discharge. 2 BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS §§ 32:21, 40:1. Some such contracts are applicable in many different states, so that the respective employers may face differing standards and results on the *same contract*, depending on whether a plant is located in the Commonwealth of Pennsylvania or immediately across the Ohio border in the Sixth Circuit. Moreover, discharge under such provisions is a very frequent subject of arbitration throughout the United States. According to the most recently published Federal Mediation and Conciliation Service Annual Report, the number of FMCS-processed arbitration awards which concerned discharge and discipline has grown steadily in the past 5 years:

	1976	*1977*	*1978*	*1979*	*1980*
Total Awards	6,855	6,935	8,155	8,270	8,482
Discharge and Disciplinary Issues	2,150	2,520	3,181	3,322	3,625
Percentage Discharge and Discipline Awards	31%	36%	39%	40%	42%

Thirty-Third Annual Report, Federal Mediation and Conciliation Service, Table 22, pp. 40-41 (GPO, 1980).

As with its ruling on past practice, the Third Circuit's ruling that a general clause may supersede a specific clause on the same subject matter is also contrary to what appears to be a *universal* view in reported arbitration decisions. For example, the Elkouri's in their oft-cited treatise, *How Arbitration Works*, p. 311 (3rd Ed. 1973), cite nine awards and no contrary views for the proposition that, "[w]here there is conflict between specific language and general language in an agreement, the specific language will govern."

4. This Court Has Not Had Occasion to Address the Standard of Review of Arbitration Awards in Twenty-Two Years

The foregoing problems are particularly acute because this Court has not had occasion to address itself to the standard of enforcement for labor arbitration awards since the "Steelworker Trilogy" was decided 22 years ago. In particular, the Court has not had the occasion to address the issue of whether a valid past practice under *Warrior & Gulf* is binding on an arbitrator under *Enterprise* or whether an award which disregards the plain meaning of a contract and violates years of plant practice must be enforced as drawing its "essence from the collective bargain-

ing agreement." The precise number of cases filed in the federal judicial system on these matters cannot be estimated. However, using officially and unofficially *reported* lower court decisions as a very rough barometer, it appears from our analysis in Appendix G hereto (A51-A74) that there has been a steady threefold-plus increase in the caseload of suits to review awards in the past 20 years, with the greatest short-term increases occurring in 1980 and 1981:

	1962-66	*1967-71*	*1972-76*	*1977-81*
Reported district and appellate court cases (from Appendix G)	36	54	79	124

In view of this, the conflict among the circuits and the recurring nature of the issue, there are compelling reasons for this Court to now provide further guidance in the application of the *Enterprise* and the *Warrior & Gulf* standards.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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May 17, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2420

ARCO-POLYMERS, INC.,
Appellee

v.

LOCAL 8-74, affiliated with the OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Action No. 80-1102H—Pittsburgh)

Submitted Under Third Circuit Rule 12(6)
February 16, 1982

Before: SEITZ, *Chief Judge*,
SLOVITER, *Circuit Judge*, and
VANARTSDALEN,* *District Judge*

(Filed February 22, 1982)

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Attorney for Appellee

* Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Ernest B. Orsatti
Jubelirer, Pass & Intrieri, P.C.
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Attorney for Appellant

Opinion of the Court

PER CURIAM:

Local 8-74 (the Union) appeals from a final order of the district court vacating an arbitration award. This court has jurisdiction under 28 U.S.C. § 1291 (1976).

I.

Labor relations between appellee Arco-Polymers, Inc. (the Company) and the Union were governed by a collective bargaining agreement that provided: (1) "Employees absent from work without good and sufficient cause for more than four (4) consecutive days shall be subject to discharge" (article XXVI, section B(1)); and (2) "Employees shall be discharged only for just cause" (article XVI, section J(1)). On March 7, 1980, the Company discharged employee Larry Anderson for being absent from work for more than four consecutive days without good cause. Anderson grieved his discharge.

The arbitrator found that Anderson was absent between February 6 and February 25, 1980; that "when he attempted to return on the 25th he was unable to show 'good and sufficient' cause for his absence"; that Anderson presented a note to the Company doctor from a physician dated February 15 which state that Anderson "was in the office today for a complete checkup"; that the note "did not indicate that [Anderson] had been ill since that date, or between February 8 and 25" that Anderson gave the

Company doctor another slip which he said showed a visit to Rochester Emergency Room on February 8; that the "hospital had no such Account Number" as appeared on the slip; that the Company doctor "found nothing wrong when he examined [Anderson] on February 25, 1980—nothing disabling in his knees or any observable signs of influenza on that date"; that "as disclosed at the hearing a common attack of influenza would not have disabled Anderson from February 5, 1980 to February 25, 1980"; that, of the twenty-eight Company employees discharged for absenteeism since 1968, twenty employees had been discharged for absences of more than four days without "good and sufficient cause" under article XXVI, section B(1); that the Company doctor, "a Board eligible and sufficiently experienced psychiatrist, suspected earlier that Anderson had a mental problem that influenced his absenteeism"; and that, if Anderson had a "knees problem," he could be discharged for continued absenteeism despite his illness. The arbitrator also discussed the relationship between article XXVI, section B(1) and article XVI, section J(1). He stated:

> Contrary to ARCO's assertion at the hearing, the burden of proof remains with the employer not the employee to show good and sufficient cause. . . . Professors Elkouir [and Elkouir] state in their treatise "How Arbitration Works," at P. 621:
>
> > "Discharge is recognized to be the extreme industrial penalty since the employee's job, his seniority and other contractual benefits, and his reputation are at stake. Because of the seriousness of this penalty, the burden generally is held to be on the employer to prove guilt on [*sic*] wrong doing, and probably always so where the agreement requires 'just cause' for discharge."

Article XVI, Section [J], Paragraph 3 of the current Contract provides

> "If after thorough investigation it is found that an employee has been unjustly discharged, the employee shall be reinstated with full back pay for the time lost."
>
> . . . .
>
> The attempt of ARCO at the hearing to inject Anderson's overall disciplinary record including absenteeism should be ignored. We are concerned here with employee absence from work and ARCO's own progressive discipline policy seems to have been effective there; he had not be[en] disciplined for absenteeism for approximately 11 months prior to his discharge.

The arbitrator also noted that the Union "respectfully submits that Larry Anderson has been unjustly discharged, and requests that he be reinstated to his former position with full back pay."

In his opinion, the arbitrator stated:

> On the question of "just cause" for discharge the Company's post hearing brief lists three known Arbitrators who agree with the Company that a specific provision on discharge, such as we have here on absenteeism, takes precedence over a general provision, i.e., Art. XVI, J(3) [*sic*] or the Arbitrators' Wolff, Ray or Kelliher decisions cited in the Union's post hearing brief.

The arbitrator did not, however, indicate whether he found ambiguity in those provisions. The next sentence, the beginning of the penultimate paragraph, states: "The Union's statement in its post hearing brief that 'the

very purpose of progressive discipline is corrective or remedial rather than punitive.' I wholeheartedly agree."

The arbitrator issued an award ordering immediate reinstatement of Anderson with no loss of seniority or other benefits, but without backpay. The Company commenced this action in the district court to vacate the arbitrator's award. The district court concluded: "Once the arbitrator made the finding of fact, as he did . . . , that Mr. Anderson failed to show good and sufficient cause for his nineteen-day-absence, the arbitrator was bound to affirm the discharge unless there was a basis in the record to modify or nullify that express contractual right." Finding no such basis, the district court vacated the award.

II.

The Union makes two principal arguments in support of its contention that the district court erred in vacating the arbitration award: (1) there is a rational basis for the arbitrator's implicit finding that the grievant was not absent from work without good and sufficient cause for more than four consecutive days; and (2) even assuming that the arbitrator found that the grievant was absent for more than four consecutive days without good and sufficient cause, the arbitration award drew its essence from the collective bargaining agreement and should thus be enforced. The Company argues: (1) that the district court properly concluded that the arbitrator found that Anderson was absent for nineteen days without cause; and (2) that the district court properly found that the arbitrator's award exceeded his contractual authority. For purposes of our discussion, we will assume, without deciding, that the district court correctly concluded that the arbitrator found that Anderson was absent for nineteen days without cause. Thus, the issue

before us is whether the arbitrator exceeded his power under the collective bargaining agreement by nonetheless awarding reinstatement to Anderson.

"[T]he scope of judicial review of an arbitrator's award is severely limited." *NF&M Corp. v. United Steelworkers*, 524 F.2d 756, 759 (3d Cir. 1975). The district court must enforce an award "so long as it draws its essence from the collective bargaining agreement." [1] *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). In *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969), this court held that an arbitrator's award "draws its essence from the collective bargaining agreement" if:

> the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disre-

---

1. We recognize that this is only one of several possible grounds for vacating an award deemed arbitrable. An award may be vacated where it is shown that there was fraud, partiality, or other misconduct on the part of the arbitrator; or where the award violates a specific command of some law—usually the National Labor Relations Act; or because the award is too vague and ambiguous for enforcement; or because of inconsistency with public policy.

Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128-29 n.27 (3d Cir. 1969) (citations omitted). Neither party suggests that the proper remedy for this award is to order the case recommitted to the arbitrator. Assuming that such a remedy is available when an award is incomplete, ambiguous, or self-contradictory, *see, e.g., United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); *Hart v. Overseas Nat'l Airways Inc.*, 541 F.2d 386, 392 (3d Cir. 1976), we do not think it is necessary to send the parties back to the arbitrator. Here, the award itself is clear and readily enforceable, and the parties only dispute whether the rationale behind the award can support it.

> gard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.

Id. at 1128. "As described by Professor Gorman, this standard requires only 'minimal rationality' of the arbitrator's decision." *Virgin Islands Nursing Association's Bargaining Unit v. Schneider*, No. 81-1748, slip op. at 5 (3d Cir. December 30, 1981) (citing R. Gorman, Labor Law 586 (1976)).

The message is clear: federal courts are not to substitute their judgment for that of the arbitrator because "'[i]t is the arbitrator's construction which was bargained for and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.'" *Ludwig*, 405 F.2d at 1125 (quoting *Enterprise Wheel*, 363 U.S. at 599). "[T]he interpretation of labor arbitrators must not be disturbed so long as they are not in 'manifest disregard' of the law, and that 'whether the arbitrators misconstrued a contract' does not open the award to judicial review." 405 F.2d at 1128 (citing *Wilks v. Swan*, 346 U.S. 427, 436 (1953); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 n.4 (1955)). *See Gorman, supra*, at 585 ("[T]he task of the court [is] to determine whether the arbitrator has resolved the grievance by considering the proper sources. . . .").

> This policy appears to rest upon two grounds: first, it is considered as an expeditious and relatively inexpensive means of settling grievances and thus as a factor in contributing to labor peace, and second, it obviates the enormous burden which would rest upon the judiciary if it should be required to settle, case by case, the endless number of grievances and

> disputes, many of them over trivial matters, which inevitably occur as between employers and employees.

Timken Co. v. United Steelworkers, 492 F.2d 1178, 1180 (6th Cir. 1974).

Moreover, courts should not disturb ambiguous, unclear, and even deliberately opaque arbitration opinions because "the policy in favor of the peaceful resolution of labor disputes through arbitration outweighs any damage which arbitration might cause." *Amalgamated Meat Cutters Local 195 v. Cross Brothers Meat Packers, Inc.*, 518 F.2d 1113, 1120 (3d Cir. 1975). In *Enterprise Wheel*, the United States Supreme Court said:

> The opinion of the arbitrator in this case, as it bears upon the award of back pay beyond the date of the agreement's expiration and reinstatement, is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of submission. Or it may be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to "the law" for help in determining the sense of the agreement. *A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not reason for refusing to enforce the award.* Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.

363 U.S. at 597-98 (footnote omitted) (emphasis added). It is irrelevant whether the courts agree with the arbitrator's application and interpretation of the agreement. *See NF&M Corp.*, 524 F.2d at 760.

Thus, the scope of our inquiry is narrow. While the arbitrator's task is to interpret the clauses of the agreement, a reviewing court may only determine whether the arbitrator's award was " 'totally unsupported by principles of contract construction.' " *Johnson Bronze Co. v. UAW*, 621 F.2d 81, 82 (3d Cir. 1980) (quoting *Ludwig*, 405 F.2d at 1128). Specifically, the issue before us is whether the arbitrator exceeded his authority under the agreement by refusing to apply article XXVI, section B(1) of the agreement to the facts of this case. If the arbitrator's award can possibly derive from an interpretation and application of the clauses of the agreement, the courts are precluded from refusing to enforce his award.

The Union recognizes that article XXVI, section B(1) specifically provides that the absence of an employee without good and sufficient cause for more than four days subjects an employee to discharge. It cannot be said with absolute certainty, however, that discharge under this section is "strictly a function of management." *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960) (interpreting term "strictly a function of management" as "referring only to that over which the contract gives management complete control and unfettered discretion"). The arbitrator's award permits the inference that he considered whether discharge under article XXVI, section B(1) is strictly a function of management once it is found that the employee was absent without good and sufficient cause or whether the arbitrator has the authority, based upon article XVI, section J(1) to reinstate an employee upon a finding that the employee was not discharged for just

cause. It is also possible that "shall be subject to discharge" suggested to the arbitrator that the clause was nonmandatory. *But see Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692, 695 (10th Cir. 1977) (finding "no ambiguity in the use of 'may' rather than 'will.' The provision gives the employer the option to discharge or not.").

Thus, the arbitrator might have found that all discharges are subject to the "just cause" provision in article XVI, section J(1) and that consequently the contract authorized him to apply all the surrounding facts and circumstances to his interpretation of the contract to determine whether or not discharge is proper. As the court noted in *Mistletoe*: "In a proper case an arbitrator . . . may construe a 'just cause' provision of a labor contract to include a progressive discipline requirement and may determine that certain conduct is 'just cause' for discipline but not for discharge." *Id.* at 695. Thus, it would not necessarily have been inconsistent for the arbitrator to have found that Anderson had no "good and sufficient cause" for his absences but that the Company had no "just cause" to discharge him. Such an interpretation would certainly not manifestly disregard the language of the agreement or lack support from principles of contract construction.[2] The arbitrator's award may represent an implicit resolution of an inherent tension between sections

2. If the arbitrator indeed found that Anderson was discharged without "just cause," it would seem that Anderson should have been entitled to backpay under art. XVI, § J(3). No backpay was awarded. Neither party, however, discusses this possible tension between the award and art. XVI, § J(3) as reason for not inferring that the arbitrator found no "just cause." We think that it is possible to infer that the arbitrator found no "just cause" and simply misapplied § J(3), which is not a concern of the courts. *See NF&M Corp.*, 524 F.2d at 760.

B(1) and J(1). Certainly it was his obligation to resolve any conflicts in construction.

If the arbitrator had explicitly set forth this analysis of the relationship between sections B(1) and J(1) of the contract, we could not say that he was modifying the agreement or exceeding the authority granted to him by the parties. Likewise, had the arbitrator issued his award without an opinion there would be no basis to vacate the award. *Cf. Schneider,* No. 81-1748, slip op. at 4 (declining to exercise supervisory power to require arbitrators to provide a record of reasons for award). The fact that the arbitrator wrote an opinion, albeit one that might be viewed as confusing and subject to various interpretations, should not cause the award to be vacated. A court should not substitute its interpretation of a contract for that of the arbitrator simply because the arbitrator's analysis is opaque. *See Enterprise Wheel,* 363 U.S. at 598.[3] We cannot say that the arbitrator's award does not draw its essence from the contract.

The analysis we have used to examine the agreement is not without case support. In *Kewanee Machinery Division v. Local 21, International Brotherhood of Teamsters,* 593 F.2d 314 (8th Cir. 1979) (employee violated employer's unilaterally adopted rule), an employee was discharged because he had exceeded the established two

3. Thus, we also reject the Company's argument that, in view of the arbitrator's unequivocal reference to "corrective discipline" near the end of his opinion, that must be the reason for the reinstatement order, not the fact that art. XVI, § J(1) supersedes art. XXVI, § B(1). Given, however, that no reasons must be given for an award, the courts are not free to determine which finding the arbitrator relied upon in making his award. Rather, the court is limited to the inquiry whether the arbitrator could possibly have made a contract interpretation that supports his award. We have already concluded that the arbitrator's award here permits the inference that he was merely interpreting the contract.

absences per month standard. The arbitrator sustained the grievance and reinstated the employee with backpay. The employer contended that the right to discharge was strictly a function of management and the arbitrator's award of reinstatement was beyond his authority where the employee had violated the rule. The United States Court of Appeals for the Eighth Circuit rejected the employer's argument, stating:

> On its face, the agreement before us contains two clauses governing the discharge of employees, one of which provides that discharges be only upon proper cause. Thus, an arbitrator *could hold* that [the Company] does not retain complete control over discharges. In so holding, the arbitrator's award took its [essence] from the collective bargaining agreement.

Id. at 317-18 (emphasis added). *See also IAM, Local* 389 *v. San Diego Marine Construction Corp.*, 620 F.2d 736, 738-39 (9th Cir. 1980) ("[T]he arbitrator does have the power to determine *when* a matter is subject to Company discretion. When two plausible interpretations of a clause of a collective bargaining agreement exist, an arbitrator's choice of one or the other ought to be honored.") (emphasis in original); *Timken Co.*, 492 F.2d at 1179 ("[I]n the present case the arbitrator could fairly construe the contract to confer upon himself the power to determine whether under the particular facts presented the employee was 'properly' discharged, even though he was technically found guilty of committing the act of striking the inspector.").[4]

4. The Company, on the other hand, argues that the courts have uniformly vacated awards that reinstate employees who violate specific contract provisions calling for discharge. The Company cites and discusses many cases in support of this provision.

In *Affiliated Food Distributors, Inc. v. Local 229, International Brotherhood of Teamsters*, 483 F.2d 418, 420 (3d Cir. 1973), *cert. denied*, 415 U.S. 916 (1974), this court said that subsequent specification in a contract impliedly limits the meaning of a preceding generalization. *See Capitol Bus Co. v. Blue Bird Coach Lines, Inc.*, 478 F.2d 556, 560 (3d Cir. 1973). Where, however, it is possible that the arbitrator could have been interpreting the contract, his failure to apply correct contract principles is irrelevant; the arbitrator's contract interpretation must be irrational before a reviewing court may disturb the

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4. (Cont'd.)

See, e.g., International Bhd. of Firemen & Oilers v. Nestle Co., 630 F.2d 474 (6th Cir. 1980); *Monongahela Power Co. v. Local 2332, IBEW*, 566 F.2d 1196 (4th Cir. 1976); *Amanda Bent Bolt Co. v. UAW, Local 1549*, 451 F.2d 1277 (6th Cir. 1971); *Local 342, UAW v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir. 1968), *cert. denied*, 395 U.S. 910 (1969); *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbot Co.*, 330 F.2d 562 (8th Cir. 1964); *Textile Workers Union, Local 1386 v. American Thread Co.*, 291 F.2d 894 (4th Cir. 1961); *Litvak Packing Co. v. Amalgamated Butcher Workmen, Local 641*, 455 F. Supp. 1180 (D. Colo. 1978); *Local 217, Union of Electrical Workers v. Holtzer-Cabot Corp.*, 277 F. Supp. 704 (D. Mass. 1967). We need not, however, engage in a protracted discussion of these cases, with their particular contract discharge clauses, specific offense clauses, and respective findings of the arbitrators. Assuming that the cases stand for the proposition for which they are cited, that our case is not distinguishable, and that this court would adopt the legal proposition advocated by the Company, the issue before us, the Company argues, would be whether the contract unequivocally reserves to the employer the right to discharge employees for the specific conduct set forth and whether the arbitrator found that Anderson engaged in the prohibited conduct. As we noted above, however, to preclude enforcement, the contract must not permit any inference that the arbitrator could reinstate the employee. We do not think this contract forecloses that inference.

award because it is "totally unsupported by principles of contract construction." *See Ludwig*, 405 F.2d at 1128. We do not think that the arbitrator's award in this case is irrational.

The Company argues that its uniform past practice of discharging employees who violate article XXVI, section B(1) is an independent ground for vacating the award. There is no doubt that such a practice is relevant to the question facing the arbitrator, *see Warrior & Gulf*, 363 U.S. at 581-82 ("[A]rbitrator's source of law [includes] the industrial common law—the practices of the industry and the shop. . . ."), and perhaps to the courts where the arbitrator has looked to those practices as part of the agreement, *see NF&M Corp.*, 524 F.2d at 759; *H.K. Porter Co. v. United Saw Workers*, 333 F.2d 596, 600 (3d Cir. 1964). We do not, however, think it is relevant to the question before this court: whether the arbitrator's award draws its essence from the contract. *But see Timken Co. v. Local 1123, United Steelworkers*, 482 F.2d 1012, 1014 (6th Cir. 1973) (vacating an arbitration award where arbitrator's award was contrary to shop practices). The only way this uniform past practice could have any relevance to our inquiry is if the Company could show that it was a uniform past practice accepted by the Union to discharge all employees who have been found absent for more than four days without good and sufficient cause. The statistic alone does not preclude a finding that employees may have been absent without good and sufficient cause yet not discharged for lack of just cause."

III.

The order of the district court will be reversed and the case remanded for proceedings consistent with this opinion.

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 80-1102

ARCO POLYMERS, INC.,
Plaintiff,

v.

LOCAL 8-74, affiliated with THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,
Defendant.

Opinion

DIAMOND, *J.*

Plaintiff, the employer-party to a collective bargaining agreement between it and the defendant union, brought this suit under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, to vacate or modify an arbitrator's award. Cross motions for summary judgment are before the court. Plaintiff's motion will be granted and the defendant's denied.

BACKGROUND

Plaintiff, a manufacturer of plastic resins, and defendant, a labor organization serving as the collective bargaining representative of plaintiff's employees, are parties to a collective bargaining agreement (Agreement). The provisions of that contract relevant here are: Article XVI which sets forth a grievance procedure for dispute resolution and provides for final and binding arbitration; Section

H 1. of that Article which states that "[t]he arbitration procedure shall not be used to change or modify this Agreement in any respect." Section J 1. of the same Article which declares that "Employees shall be discharged only for just cause." and Article XXVI, Section B 1. which provides that "Employees absent from work without good and sufficient cause for more than four (4) consecutive days shall be subject to discharge."

The dispute underlying this case arose when plaintiff notified an employee, one Larry Anderson, that he was discharged pursuant to Article XXVI, Section B 1. The defendant union filed a grievance in response to the discharge notice, and the matter proceeded to arbitration where probational reinstatement of Mr. Anderson was ordered. Plaintiff then filed this suit seeking to have the award vacated or modified on the ground that the arbitrator exceeded his authority under Article XVI, Section H 1. of the Agreement when he nullified the company's right under Article XXVI, Section B 1. to discharge an employee who failed to show good and sufficient cause for an absence from work of more than four consecutive days. The defendant answered that the award "draws its essence" from the collective bargaining agreement and, therefore, should be affirmed.

APPLICABLE LAW

The general principles which govern the judicial review of an arbitrator's award are summarized by the Third Circuit in *NF & M Corp. v. United Steelworkers of America*, 524 F.2d 756 (3rd Cir. 1975). We quote relevant excerpts from pages 759-760.

> Although the scope of judicial review of an arbitrator's award is severely limited, a court must ascertain whether the award "draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Corp.*, 363 U.S. 593,

597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960); *Local 103 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO v. RCA Corp.*, 516 F.2d 1336 (3rd Cir. 1975). This Circuit has elaborated upon that language:

> [A] labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.
>
> *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123, 1128 (3rd Cir. 1969).

. . . .

If the arbitrator's award has deviated from the plain meaning of a labor contract provision, it must find support in the contract itself or in prior practices demonstrating relaxation of the literal language. *H. K. Porter Co., Inc. v. United Saw, File and Steel Products Workers of America*, 333 F.2d 596 (3rd Cir. 1964). An arbitrator may find compliance with the express terms of the grievance procedure in a labor contract excused by the parties' practical construction of it or "in light of the practice of the shop." *Yellow Cab Co. v. Democratic Union Organizing Committee, Local 777*, 398 F.2d 735, 737 (7th Cir. 1968), *cert. denied*, 393 U.S. 1015, 89 S.Ct. 619, 21 L.Ed.2d 561 (1969).

. . . .

An arbitrator is not required to list his reasons for the award, nor should an ambiguity in his opinion be

seized upon to support an inference that he exceeded his authority. *Enterprise, supra.* Further, a court is precluded from overturning an award for errors in assessing the credibility of witnesses, in the weight accorded their testimony, or in the determination of factual issues. *Amalgamated Butchers, Local 641 v. Capitol Packing Co.*, 413 F.2d 668 (10th Cir. 1969); *Dallas Typographical Union, No. 173 v. A. H. Belo Corp,.* 372 F.2d 577 (5th Cir. 1967); *International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local 874 v. St. Regis Paper Co.*, 362 F.2d 711 (5th Cir. 1966).

Nonetheless, if an examination of the record before the arbitrator reveals no support whatever for his determination, his award must be vacated. *Electronics Corp. v. International Union of Electrical, Radio and Machine Workers, Local 272*, 492 F.2d 1255 (1st Cir. 1974); *H. K. Porter, Co., supra.*

. . . .

. . . Whether or not we agree with the arbitrator's application and interpretation of the contract is irrelevant. It is his "construction which was bargained for and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from him." *United Steelworkers of America v. Enterprise, Wheel & Car Corp.*, 363 U.S. 593, 599, 80 S.Ct. 1358, 1362, 4 L.Ed.2d 1424 (1960).

DISCUSSION

In his opinion, the arbitrator found as a fact that:

Company practice is that when an employee is absent over seven days, his time card is pulled and when he returns to work he must be cleared for med-

ical approval through the plant dispensary. There is nothing unusual about this. Anderson had been absent between February 6 and 25 and when he attempted to return on the 25th he was unable to show "good and sufficient" cause for his absence. He did show Dr. Kerns [the plaintiff company's doctor] a slip from a Dr. Sika dated February 15 which stated:

> "Mr. Larry Anderson was in the office today for a complete checkup."

It did not indicate that he had been ill since that date, or between February 8 and 25.

Anderson also gave Kerns a slip which he claimed represented a visit to Rochester Hospital Emergency Room on February 8. That hospital had no such Account Number. Kerns himself found nothing wrong when he examined him [Anderson] on February 25, 1980—nothing disabling in his knees or any observable signs of influenza on that date. Confining ourselves strictly to absenteeism, Anderson's record did not improve even after he had been given 3-day and 5-day suspensions in 1979. [Matter in brackets added] Arb. op. pp. 9-10.

Notwithstanding the finding that Anderson had been absent from work for nineteen consecutive days without good and sufficient cause and the clear language of Article XXVI, Section B 1., the arbitrator nevertheless awarded reinstatement.[1] Such a deviation from the plain meaning

1. The award in its entirety states:

> The proper disposition of Larry Anderson's Grievance No. CO-13-80 is that he shall be immediately reinstated to his former job without loss of seniority or other benefits but no back pay, for a probationary period of six (6) months during which he 1) must seek help from the Community Health

of the contract can be justified only if it finds support in the contract itself or if the record reveals past practices which demonstrate a "relaxation of the literal language." *NF & M Corp., supra,* at 759.

However, the arbitrator made no attempt to support his award on either of these bases, and our independent analysis of his opinion, which constitutes the entire record before us, reveals no rational basis or support whatever for the award. *Id.,* at 760. In fact, if anything, his opinion appears to support precisely a contrary award. First, he notes that the plaintiff presented documentation of twenty-eight discharges for excessive absenteeism covering a period of approximately eleven years and finds that in twenty of those terminations the company relied exclusively on the consecutive-absences-clause found in Article XXVI, Section B. 1. He draws no specific inference from this finding, but it certainly supports the conclusion that the plaintiff had rather consistenly over a significant period of time invoked the literal provisions of Article XXVI, Section B 1. to discharge employees for excessive absenteeism, and, consequently, that there is no basis in this past practice from which one properly could infer any "relaxation of the literal language" of that provision.

The arbitrator next enters into the following discussion of the relationship between Article XVI, Section J 1. and Article XXVI, Section B 1.:

> . . . On the question of "just cause" for discharge the Company's post hearing brief lists three known Arbitrators who agree with the Company that a

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1. (Cont'd.)

Center of Beaver County in at least four (4) visits at the Company's expense . . . certification to Dr. J. D. Kerns . . . during the first six weeks of his re-employment and 2) his percentage of absence during his probation must not be greater than that of the plant as a whole.

specific provision on discharge, such as we have here on absenteeism, takes precedence over a general provision, i.e., Art. XVI, J (3) [sic.] or the Arbitrators' Wolf, Ray or Kelliher decisions cited in the Union's post hearing brief, Arb. op. p. 10.

But, instead of indicating whether or not he found ambiguity in those provisions and, if so, resolving it, the arbitrator abruptly ends his discussion of this subject with the above statement and goes on to an entirely different subject matter, thereby suggesting either that he found no ambiguity or that if he did he implicitly was resolving it in favor of the plaintiff's position.[2] In any event, even if we assume that the arbitrator somehow deemed Article XVI, Section J 1. controlling, there is nothing in his opinion remotely to suggest that he found that the discharge was "unjust," and much in his specific findings and the nature of the award to indicate that he believed the opposite. *See* for example, excerpts from arb. op. pp. 9-10 *supra*, and the conditional nature of the reinstatement award at fn. 1 *supra*.

Thus, the arbitrator, without a record of past shop practices or dealings between the parties to support a finding that the company had waived its prerogatives under Article XXVI, Section B 1, or on some theory of contract construction to suggest the modification or nulli-

2. Indeed, a contrary finding would have been "totally unsupported by principles of contract construction . . ." *Ludwig Honold, supra* at 1128, since, as the arbitrator's opinion suggests, it is a well established rule of contract construction that "'a subsequent specification [Article XXVI, Section B 1.] impliedly limits the meaning of a preceding generalization. [Article XVI, Section J 1.]'" *Affiliated Ford Distributors, Inc. v. Local Union No. 229*, 483 F.2d 418, 420 (3rd Cir. 1973), (Matters in brackets added). Accord, *Capitol Bus Co. v. Blue Bird Coach Lines, Inc.*, 478 F.2d 556 (3rd Cir. 1973).

fication of that provision, was clearly in excess of his authority under Article XVI, Section H 1. of the Agreement when he proceeded to modify it by nullifying the specific, unambiguous, contractual right of the plaintiff to discharge an employee who had been absent for more than four days without "good and sufficient cause."

In that regard, this case is quite similar to *International Brotherhood of Firemen and Oilers, AFL-CIO, Local No. 935-B. v. Nestle Co., Inc.*, 630 F.2d 474 (6th Cir. 1980) relied on by plaintiff. The collective bargaining agreement in that case provided that "insubordination . . . shall constitute cause for the dismissal of any employee from the service of the Company". *Id.*, at 475. The arbitrator made a finding that the grievant refused to obey a direct order of his superiors on two or three occasions, but nevertheless ordered reinstatement of the grievant who had been discharged for insubordination. The Circuit Court vacated the arbitrator's award which attempted to modify the contractual phrase "shall constitute cause" to read "may constitute cause." In reversing the district court, the circuit stated:

> . . . [T]he collective bargaining agreement expressly provided that insubordination shall be grounds for discharge. It is clear and unambiguous. It needs no interpretation and we find no provision in it giving the arbitrator power to prescribe the penalty for violation of the collective bargaining agreement or to control the exercise of it by the employer. This power was vested solely in the employer.
>
> The employer was not required to discharge the employee who violated the collective bargaining agreement and in the present case probably would not have done so except for further aggressive acts committed by the employee. The fact that the arbi-

trator found that such further acts were not corroborated by evidence did not militate against the right of the employer to discharge the grievant for insubordination. *Id.*, at 477.

Nestle re-affirms a settled rule in the Sixth Circuit that an arbitrator may not change or ignore the plain language of a collective bargaining agreement. *See Amanda Bent Bolt Co. v. International Union, United Automobile, Aerospace, Agricultural Implement Workers of America, Local 1549*, 451 F.2d 1277 (6th Cir. 1971).

Under the collective bargaining agreement, the plaintiff had the express right to discharge an employee who was absent from work without good and sufficient cause for more than four consecutive days. Once the arbitrator made the finding of fact, as he did at p. 9 of his opinion, that Mr. Anderson failed to show good and sufficient cause for his nineteen-day-absence, the arbitrator was bound to affirm the discharge unless there was a basis in the record to modify or nullify that express contractual right. *NF & M Corp., supra.* There was no such basis, and it was not the function of the arbitrator to substitute his discretion for that of the employer.

The arbitrator's authority was to construe the collective bargaining agreement and objectively to apply it to the facts. *Nestle, supra.; Detroit Coil Company v. International Association of Machinists & Aerospace Workers, Lodge #2*, 594 F.2d 575 (6th Cir. 1979); *Amanda, supra.; Timken Company v. United Steelworkers of America*, 492 F.2d 1178 (6th Cir. 1974). Instead, the award is abruptly contrary to the specific factual findings and legal reasoning which precedes it. As such, it is a gross non-sequitur and a classic example of an arbitrator dispensing "his own brand of industrial justice." As a consequence, we find

that the award does not "draw its essence from the collective bargaining agreement" *Enterprise Wheel, supra.*, 363 U.S. at 597, and must be vacated.[3] Accordingly, the plaintiff's motion for summary judgment will be granted and the defendant's motion denied.

/s/ GUSTAVE DIAMOND
United States District Judge

Dated: July 10, 1981

xc: George I. Minch, Esquire
624 Frick Building
Pittsburgh, PA 15219

David E. Rosebaum, Esquire
ARCO
1500 Market St.
Philadelphia, PA 19101

Ernest B. Orsatti, Esquire
2000 Lawyers Building
Pittsburgh, PA 15219

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3. The arbitrator's award is dated June 18, 1980, but the company did not reinstate Anderson until July 11, 1980. The defendant counter claimed against the plaintiff for wages that Anderson lost when the company delayed his reinstatement. To prevail on its counter claim the defendant must establish the validity of the arbitrator's award. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), *Cf Teamsters Local No. 25 v. Penn Transportation Corp.*, 359 F.Supp. 344 (D. Mass. 1973). Since the court concludes that the arbitrator's award exceeded his contractual authority, the defendant is precluded from recovering on its counter claim. Therefore, the plaintiff's motion for summary judgment on the defendant's counter claim will be granted and the defendant's cross-motion for summary judgment on its counter claim will be denied.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 80-1102

ARCO POLYMERS, INC.,
Plaintiff,

v.

LOCAL 8-74, affiliated with THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,
Defendant.

Order of Court

AND NOW, this 10th day of July, 1981, for the reasons set forth in an opinion filed by the court in the within matter on this date, IT IS ORDERED that the plaintiff's motion for summary judgment be, and the same hereby is, granted and the defendant's cross-motion denied; and,

IT IS FURTHER ORDERED that the plaintiff's motion for summary judgment on the defendant's counter claim be, and the same hereby is, granted and the defendant's cross-motion denied.

/s/ GUSTAVE DIAMOND
United States District Judge

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2420

ARCO POLYMERS, INC.

v.

LOCAL 8-74, affiliated with THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,
Appellants

(D.C. Civil No. 80-1102)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge;* SLOVITER, *Circuit Judge;* and VANARTSDALEN, *District Judge.**

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* Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on February 16, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered July 10, 1981, be, and the same is hereby reversed and the cause remanded for proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:
/s/ SALLY MRVOS
Clerk

February 22, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2420

ARCO POLYMERS, INC.

v.

LOCAL 8-74, affiliated with THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,
Appellant

(Civil No. 80-1102H—W.D.Pa.—Pittsburgh)

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge*, ALDISERT, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and VANARTSDALEN, *District Judge*.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

* Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

voted for rehearing by the court in banc, the petition for rehearing is denied.

By The Court,
/s/ SEITZ
Chief Judge

Dated: March 18, 1982

APPENDIX D

Arbitration

In the Matter of	
ARCO/POLYMERS, INC.	Grievance No. CO-13-80
Subsidiary of Atlantic Richfield Company	Discharge of
Monaca, Pennsylvania	Larry D. Anderson
and	Before
OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION	Robert J. Wagner, Arbitrator
	Hearing: May 20, 1980
Local Union No. 8-74	Award: June 18, 1980

JURISDICTION

The undersigned was notified by letter dated May 12, 1980 from the Company's Employee Relations Manager, James M. Talton and the Union's Counsel, Joseph J. Pass, Jr., that I would be expected to hear the question in dispute between the parties on May 20, 1980 at the offices of the Company. This was done. A transcript was taken and mailed to all concerned under date of June 2, 1980. Post hearing briefs were received from the parties on June 12, 1980.

APPEARANCES

FOR THE UNION:	
Ernest B. Orsatti, Esq.	Attorney
Mils Belich	President, Local Union No. 8-74
Vic Miller	Vice President, Local Union
Jas. E. Hartle	Financial/Corresponding Secretary
Donald P. Kavals	Recording Secretary

Sam Belick	Chief Steward
William H. Anthony	Shop Steward
Joe Zoiti	Witness
Larry D. Anderson	Grievant

FOR THE COMPANY:

David E. Rosenbaum, Esq.	Attorney
Jas. M. Talton	Mgr., Employee Relations
A. L. Rice	Supvr., Employee Relations
Jack D. Kerns, M.D.	Medical Director, Pittsburgh Area

BACKGROUND

Larry D. Anderson, a Materials Handler at the ARCO/Polymers plant, hired September 19, 1977, was discharged by the following letter dated March 7, 1980 from Employee Relations Supervisor A.L. Rice (Joint Exhibit 2):

> "A review of your record has indicated that you have been absent from work without official leave or verifiable good and sufficient cause since February 6, 1980. This period encompasses twenty (20) working days for which you have been absent without good and sufficient cause."
>
> "I refer you to Article XXVI, Section B, Subparagraph 1, of our Collective Bargaining Agreement: "Employees absent from work without good and sufficient cause for more than four (4) consecutive working days will be subject to discharge".
>
> "This letter is your official notification that, having failed to substantiate your absence for over twenty (20) days, you have forced the Company to apply Article 26, Section B, of our contract. Your employment with ARCO Polymers, Inc. Beaver Valley Plant —is hereby and officially terminated effective this

date, March 7, 1980. Any and all compensation and/or benefits due you as an employee of ARCO Polymers will cease as of March 7, 1980.

"If you have any questions in response to this letter, please contact the Employee Relations Department."

A grievance, No. CO-13-80 (Joint Ex. 3) was then filed by the Local Union's Executive Board, signed by Chief Steward Sam Belick which stated:

"Protest the unjust discharge of L. Anderson. Request that L. Anderson be reinstated with full pay for time lost and all overtime that he was entitled to. Request this grievance be moved and heard in the next third step. "Violation-Date March 7, 1980"

The "Reply in Third Step," dated March 21, 1980, and signed by James M. Talton, Plant Manager and Victor A. Miller, President of the Local was "No Agreement." This brought the grievance on to arbitration under Article XVI of the Contract—with time limits allowance for the transcript.

THE ISSUE

Since the parties could not agree upon any precise language of the Issue before the Arbitrator we shall use standard procedure and the question is "What is the proper disposition of Grievance No. CO-13-80 under the terms of the Contract?"

PERTINENT CONTRACT PROVISIONS:

ARTICLE XXV—Employee Report Off

Section A: Procedure

1. This is to clarify the method that should be used by employees reporting off from work due to illness or other legitimate reasons.

2. The employee involved or the person calling for him will call the plant at 774-1000. This should be done several hours prior to his normal reporting time. The employee should request to be connected with Guard Headquarters. When the employee reports off, he should give the following information:

Name of employee	His immediate foreman
Badge number	The reason for reporting off
Department	The name of the person calling
Shift	When the employee expects to return

3. This information will be recorded by the Guard who will then contact a Foreman in the unit or department involved as soon as possible.

4. An employee should report off each day unless he knows that he will be off for several days, in which case he should give this information to the Guard. During the forty-eight (48) hour period starting with the starting from the beginning of the first complete shift of absence, a shift worker or daylight exception worker is required to contact the plant at least eight (8) hours before his next scheduled shift in order that proper adjustment in scheduling may be made. After the forty-eight (48) hour period it is required that he contact the plant at least sixteen (16) hours before his next scheduled shift.

5. This method of reporting off insurers that responsible people have received the call and made note of it.

ARTICLE XXVI—Attendance

Section A: Absence From Work

1. Employees who find it necessary to be absent for illness or other legitimate reasons that are not known in advance must report off according to Article XXV.

2. Employees who do not request permission time off and who have not received approval in advance; or who do not report off will be considered absent and subject to the provisions of Section B of this Article.

3. If the employee reporting off gives a reason which is questionable, it will be discussed upon his return and the status determined at that time.

Section B: Excessive Absenteeism

1. Employees absent from work without good and sufficient cause for more than four (4) consecutive days shall be subject to discharge.

2. If an employee accumulates five (5) unexcused absences within a six (6) month period following or preceding the anniversary of his hiring date, he will be notified in writing with a copy to the Chief Steward of the Union of such circumstances and warned that it will be subject to discharge if absent more than two (2) additional times within the specified period.

Section C: Minimizing Absenteeism and Labor Turnover

1. The Union and the Company agree to take suitable action among the employees they represent to keep absenteeism at a minimum and to keep down excessive labor turnover.

ARTICLE XVI—Grievance Procedure

Section J: Discharge of Employees

1. Employees shall be discharged only for just cause.

CONTENTIONS OF THE PARTIES

THE COMPANY insists that Grievant Larry Anderson's attendance record was one of the worst it has had in some-

time and its right to discharge him is clearly set forth in the Contract under Article XXVI, Section B(1). There, the parties had agreed that an employee who did not show up for work without good and sufficient cause for four consecutive days would be subject to discharge. Since he had not reported for work in the preceding four days (in fact 20 days) without a good cause prior to March 7, 1980, he was discharged.

The Company's practice is not to pull an absent employee's time card until after he has been off seven days to get the reason. However, the Company demonstrated with letters (Company Ex. 1 A through IBB) that it had 28 employees who had been discharged after four days absence with its interpretation of just cause. Using calendar years, Anderson was absent 64 days out of 247 available workdays or 25.9 per cent of the time in 1978. In 1979, he was absent 67 out of 245 days or 27.3 per cent. In 1980, he was absent 26 out of 38 workdays or 68.4 per cent. His first discipline was on May 30, 1978 when he was verbally warned that he had already missed 11 days.

His attendance record did not improve. A formal letter was sent to him on October 24, 1978 noting that he had missed 23 days since his May 30th warning. He then received a disciplinary layoff of three days on January 22, 1979 for absenteeism noting that he had missed 11 days since his verbal warning in October. On June 8, 1979, in line with its policy of progressive discipline, Anderson was given five days off for unacceptable absenteeism. Prior to this date a Management-Union meeting was held on April 3, 1979 where the five-days suspension was discussed but withheld.

Management, convinced that medical problems may have some influence on Anderson's excessive absenteeism, asked him on three occasions to consult with the staff at the Community Health Center of Beaver County but he

refused to do so. Anderson had met with the Company's Doctor Kerns on February 25, 1980 and presented him with a note from Dr. Sika stating he had examined Anderson on February 15, 1980. Dr. Kerns phoned Dr. Sika on March 7, 1980. The latter who had examined Anderson the day before, stated "There has been no reason why the patient could not have been at work".

The Company holds that Anderson's discharge was for his excessive absence without good and sufficient cause and his grievance should be denied. *THE UNION* insists that ARCO discharged Larry Anderson in violation of its own policies and procedures. When an employee calls in and reports off due to sickness or injury and will call in again as soon as he is able to return to work he is considered a so-called "will call". He first called in on February 6, 1980 reporting off with influenza. He also had problems with his knees hurting him that day and his wife phoned in. Larry called in again on February 8th reporting "Flu and leg trouble". At the hearing, ARCO admitted that contrary to their opinion at the time of discharge, the Grievant did properly go on "will call" status (T.47). Also, for the first time, ARCO based its grounds for discharge on the Grievant's overall excessive absenteeism and disciplinary record.

Anderson attempted to return to work on February 25, 1980, his knees giving him less pain, but was prevented from doing so by the ARCO physician, Dr. Kerns. The Company doctor was given a slip from a Dr. Victor Sika verifying that he was to see Anderson on February 15, 1980. Also asking Dr. Kerns to call him. Anderson's knee was visibly swollen when he saw Dr. Kerns on February 25th and the latter testified that he wasn't sure whether or not he could return to work (T.75). Furthermore, ARCO failed to show that the Grievant was not suffering from pain in his knees, particularly in light of Dr. Kerns' testimony @ T.75 and 76.

Contrary to ARCO's assertion at the hearing, the burden of proof remains with the employer not the employee to show good and sufficient cause. The decision of three other prominent Arbitrators are cited herein to prove this point. Professors Elkouir state in their treatise "How Arbitration Works," at P.621:

> "Discharge is recognized to be the extreme industrial penalty since the employee's job, his seniority and other contractual benefits, and his reputation are at stake. Because of the seriousness of this penalty, the burden generally is held to be on the employer to prove guilt on wrong doing, and probably always so where the agreement requires 'just cause' for discharge."

Article XVI, Section 4, Paragraph 3 of the current Contract provides

> "If after thorough investigation it is found that an employee has been unjustly discharged, the employee shall be reinstated with full back pay for the time lost."

Local 8-74 respectfully submits that extreme pain in the knees is good and sufficient reason for absence. The attempt of ARCO at the hearing to inject Anderson's overall disciplinary record including absenteeism should be ignored. We are concerned here with employee absence from work and ARCO's own progressive discipline policy seems to have been effective there; he had not been disciplined for absenteeism for approximately 11 months prior to his discharge.

Upon the basis of the foregoing facts, arguments and authorities, Local 8-74 respectfully submits that Larry Anderson has been unjustly discharged, and requests that he be reinstated to his former position with full back pay.

OPINION

The employee in this case was discharged for his absence without good and sufficient cause (Art. XXVI, B(1)) as the Company contends or discharged without just cause Art. XVI, J(1) as the Union insists? And in between with Grievant Larry Anderson we have a hodge-podge of progressive discipline penalties, physical infirmities and contradictory testimony.

Company practice is that when an employee is absent over seven days his time card is pulled and when he returns to work he must be cleared for medical approval through the plant dispensary. There is nothing unusual about this. Anderson had been absent between February 6 and 25 and when he attempted to return on the 25th he was unable to show "good and sufficient" cause for his absence. He did show Dr. Kerns a slip from a Dr. Sika dated February 15 with stated:

> "Mr. Larry Anderson was in the office today for a complete checkup".

It did not indicate that he had been ill since that date, or between February 8 and 25.

Anderson also gave Kerns a slip which he claimed represented a visit to Rochester Hospital Emergency Room on February 8. That hospital had no such Account Number. Kerns himself found nothing wrong when he examined him on February 25, 1980—nothing disabling in his knees or any observable signs of influenza on that date. Confining ourselves strictly to absenteeism, Anderson's record did not improve even after he had been given 3-day and 5-day suspensions in 1979.

Company Ex. 1(a)—(BB) include 28 discharge letters for excessive absenteeism and/or absence without good and sufficient cause since December 1, 1968. We note that the 20 of these employees terminated for absence over four days relied solely upon Article XXVI, B (1) of

the Contract. On the question of "just cause" for discharge the Company's post hearing brief lists three known Arbitrators who agree with the Company that a specific provision on discharge, such as we have here on absenteeism, takes precedence over a general provision, i.e., Art. XVI, J (3) or the Arbitrators' Wolff, Ray or Kelliher decisions cited in the Union's post hearing brief.

The Union's statement in its post hearing brief that "the very purpose of progressive discipline is corrective or remedial rather than punitive". I wholeheartedly agree. And it was plain that Dr. Kerns, a Board eligible and sufficiently experienced psychiatrist, suspected earlier that Anderson had a mental problem that influenced his absenteeism. And if all the truth were known I would not be surprised to learn that Dr. Sika mentioned this when he talked to Kerns on March 7, 1980.

I am not going to belabor the medical point here but, as disclosed at the hearing a common attack of influenza would not have disabled Anderson from February 5, 1980 to February 25, 1980. As for his knees, if he frequently has such attacks as he described, he is in real trouble. The Union cited a decision from the Ekouris in support of its position. I would like to cite one here from Arbitrator Teple in *Cleveland Trencher*, 48 LA615 (1967)as follows:

> "At some point the employer must be able to terminate the services of an employee who is unable to work more than part-time, for whatever reason. Efficiency and the ability to compete can hardly be maintained if employees cannot be depended upon to report for work with reasonable regularity. Other Arbitrators have so found, and this Arbitrator has upheld terminations in several appropriate cases involving frequent and extended absences due to illness".

But just before citing the above from their "How Arbitration Works" (p.546) the authors have this statement: "The right to terminate employees for excessive absences, even where they are due to illness, is generally recognized by Arbitrators". I cite the above only to impress upon Anderson the importance of immediately getting his knees problem . . and anything else he has . . permanently corrected.

AWARD

The proper disposition of Larry Anderson's Grievance No. CO-13-80 is that he shall be immediately reinstated to his former job without loss of seniority or other benefits but no back pay, for a probationary period of six (6) months during which he 1) must seek help from the Community Health Center of Beaver County in at least four (4) visits at the Company's expense . . . certification to Dr. J. D. Kerns . . during the first six weeks of his re-employment and 2) his percentage of absence during his probation must not be greater than that of the plant as a whole.

Respectfully submitted,
Robert J. Wagner
ARBITRATOR

Made at Pittsburgh, Pennsylvania
This 18th Day of June 1980

APPENDIX E

Exhibit "A"

AGREEMENT

This Agreement, made as of May 27, 1977, by and between ARCO/POLYMERS, INC. BEAVER VALLEY PLANT (hereinafter referred to as the "Company") and LOCAL 8-74, affiliated with the OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, (hereinafter referred to as the "Union"), acting on behalf of the employees of the Company who are represented by the Union at the Company's Monaca, Pennsylvania, Plant.

• • •

Article XVI—Grievance Procedure

Section A: Grievance Definition.

1. A grievance is defined as any difference of opinion, controversy or dispute between the Company and the Union or between the Company and any employee with respect to the interpretation, application, or alleged violation of any of the provisions of this Agreement.

Section B: Grievance Committee.

1. The Grievance Committee composed of no more than four (4) employees and a Shop Steward shall be the Union's representative and will be recognized and dealt with by the Company as the Union's representative for settling grievances.

Section C: Initial Efforts To Settle Grievances.

1. It is understood that for the purpose of settling grievances as expeditiously and effectively as possible an employee and/or Steward may discuss his grievance with

his immediate supervisor who will attempt to settle it to the mutual satisfaction of the employee and the Company.

2. The parties recognize that any employee who feels that he is aggrieved should submit such grievance to the grievance procedure without delay. A grievance must be filed within ten (10) days from the date the alleged violation first occurred.

3. The parties to this Agreement recognize that the grievance should be settled promptly and as close to the source as possible. Further, commencing at the verbal step both parties will endeavor to present all the facts relating to this grievance.

Section D: Steps of Grievance Procedure.

1. The following procedure which may be initiated by the Union shall be applied and relied upon by both parties as the sole and exclusive means of seeking an adjustment of and settling any grievance.

Step 1: A conference among the aggrieved employee, his Steward, the employee's immediate Foreman, and his Departmental Foreman will be scheduled and held within five (5) (except Saturday, Sunday or holidays) days after notification of said grievance. The time for this discussion shall be so arranged by the Departmental Foreman so as not to interfere with the work in the department. If settlement is not reached or an answer is not given to the Shop Steward by the Departmental Foreman within two (2) days (except Saturday, Sunday or holidays) after this conference, the grievance can be moved to Step 2 if requested by the Union within five (5) days after receipt of the Step 1 answer.

Step 2: * By conference among the aggrieved employee, his Steward, Chief Steward, and/or Chairman of

* See Memorandum of Agreement—Clarifications.

the Grievance Committee, Superintendent, other Management Representatives and any other salaried personnel directly connected with the grievance within ten (10) days (except Saturday, Sunday or holidays) after the meeting is requested by the Union. If settlement is not reached or an answer is not given to the Union by the Departmental Superintendent within five (5) days (except Saturday, Sunday or holidays) after this conference, the grievance can be moved to Step 3 if requested by the Union within five (5) days (except Saturday, Sunday or holidays) after receipt of the Step 2 answer. All grievances submitted to Step 3 shall be first reduced to writing and presented to the Plant Employee Relations Manager within the designed time limits.

Step 3: By conference among officials of the Union and Management Representatives within thirty (30) days after a meeting is requested by the Union.

2. A grievance may be instituted at Step 3 if recommended by the Union Executive Board and the Plant Employee Relations Manager.

Section E: Arbitration.

1. A grievance not settled as set forth in Section D of this Article shall be deemed subject to arbitration if the party that initiated the grievance notifies the other in writing within forty (40) days after completion of the third step meeting of its intention to take the grievance to arbitration. Such notification must be in sufficient detail for identification purposes. Within five (5) days after such notification, the parties shall jointly request an Arbitrator to set a hearing date within sixty (60) days of submission of the matter to him. The Arbitrator must render a decision within thirty (30) days from the date of the hearing.

2. An Arbitrator shall be selected by agreement between the Company and the Union from a panel submitted

by the Federal Mediation and Conciliation Service. The Arbitrator so selected shall serve as an impartial Arbitrator for the grievances for which he or she is so selected. In the event the Arbitrator so selected cannot preside over the hearing due to illness, etc., the parties will reschedule said arbitration, with the same Arbitrator unless the rescheduling is untimely.

3. The Arbitrator shall determine the time, place and frequency of meeting and the procedure that shall govern the presentation and hearing of matters referred to him.

Section F: Time Limits.

1. The time limits set forth in this Article are intended to be strictly applied. The failure of the Company to hold a meeting or give an answer within the time limits herein established shall result in a settlement of the grievance in favor of the aggrieved employee. The failure of the Union to process a grievance within the applicable time limits shall result in a grievance forfeiture of said grievance. The settlement of any grievance pursuant to this Section shall not establish a precedent and shall not be used or cited in future grievances or arbitrations.

2. The time limits established in this Article may be extended by mutual agreement of the parties.

Section G: Arbitration Decisions.

1. Decisions of the Arbitrator shall be final and binding upon the Company and the Union.

2. No decision shall be made by the Arbitrator without the participation of the representatives of both the Union and the Company unless, in the opinion of the Arbitrator, proceedings are being unnecessarily delayed. In this case, after due notice by the Arbitrator to both parties hereto, decisions may be reached without the participation of the party causing the delay.

Section H: Limits to Arbitration Procedure.

1. The arbitration procedure shall not be used to change or modify this Agreement in any respect.

Section I: Arbitration Costs.

1. The expenses of the Arbitrator shall be borne equally by the Company and the Union.

Section J: Discharge of Employees.

1. Employees shall be discharged only for just cause.

2. Any protest against a discharge must be handled in accordance with the grievance procedure and must be made within one (1) week of the time of notification of such discharge by the Company in writing to the Union.

3. If after thorough investigation it is found that an employee has been unjustly discharged, the employee shall be reinstated with full pay for time lost.

Section K: Visitation of Union Officers.

1. The President and/or Chief Steward of the Local Union shall be permitted to visit the Plant at any time to investigate grievances after proper notification to the Plant Employee Relations Manager or the Shift Superintendent.

2. Representatives of the International Union upon making an appointement with the Plant Employee Relations Manager shall be permitted to visit the Plant during daytime working hours to investigate grievances presented in writing by the Union.

Section L: Time Off for Union Representatives.

1. The Union representatives shall be allowed such time off with pay which would otherwise be received as may be required to attend meetings held under the grievance procedure.

• • •

Article XXV—Employee Report Off

Section A: Procedure.

1. This is to clarify the method that should be used by employees reporting off from work due to illness or other legitimate reasons.

2. The employee involved or the person calling for him will call the Plant at 774-1000. This should be done several hours prior to his normal reporting time. The employee should request to be connected with Guard Headquarters. When the employee reports off, he should give the following information:

Name of employee
Badge number
Department
Shift
His immediate foreman
The reason for reporting off
The name of the person calling
When the employee expects to return.

3. This information will be recorded by the Guard who will then contact a Foreman in the unit or department involved as soon as possible.

4. An employee should report off each day unless he knows that he will be off for several days, in which case he should give this information to the Guard. During the forty-eight (48) hour period starting from the beginning of the first complete shift of absence, a shift worker or daylight exception worker is required to contact the plant at least eight (8) hours before his next scheduled shift in order that proper adjustment in scheduling may be made. After the forty-eight (48) hour period it is required that he contact the plant at least sixteen (16) hours before his next scheduled shift.

• See Memorandum of Agreement—Clarifications.

5. This method of reporting off insures that responsible people have received the call and made note of it.

Article XXVI—Attendance

Section A: Absence From Work.

1. Employees who find it necessary to be absent for illness or other legitimate reasons that are not known in advance must report off according to Article XXV.

2. Employees who do not request permission time off and who have not received approval in advance; or who do not report off will be considered absent and subject to the provisions of Section B of this Article.

3. If the employee reporting off gives a reason which is questionable, it will be discussed upon his return and the status determined at that time.

Section B: Excessive Absenteeism.

1. Employees absent from work without good and sufficient cause for more than four (4) consecutive days shall be subject to discharge.

2. If an employee accumulates five (5) unexcused absences within a six (6) month period following or preceding the anniversary of his hiring date, he will be notified in writing with a copy to the Chief Steward of the Union of such circumstances and warned that he will be subject to discharge if absent more than two (2) additional times within the specified period.

Section C: Minimizing Absenteeism and Labor Turnover.

1. The Union and the Company agree to take suitable action among the employees they represent to keep absenteeism at a minimum and to keep down excessive labor turnover.

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 80-1102

ARCO POLYMERS, INC.,
Plaintiff,

v.

LOCAL 8-74, affiliated with THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,
Defendant.

Transcript of Proceedings

of Oral Argument held on April 1, 1981, commencing at 2:00 o'clock p.m., in the United States District Court, Pittsburgh, Pennsylvania, before the Honorable Custave Diamond, District Judge.

APPEARANCES:

On behalf of the Plaintiff:
David E. Rosenbaum, Esquire
George I. Minch, Esquire

On behalf of the Defendant:
Ernest B. Orsatti, Esquire

[39]

THE COURT: But I don't think Amanda or any of the other cases dealing with specific instances as opposed

to setting forth broad principles for us to follow, such as the trilogy and Ludwig Honold and those cases, can be definitive help, because you have the peculiar circumstances surrounding the negotiation for the contract, the past practices with regard to the contract, the specific facts that were involved in the instance before the arbitrator and all of those things.

MR. ROSENBAUM: Well, you see, at the present time I have a record that has in it 28 exhibits of which 20 involve—28 Exhibit No. 1's.

THE COURT: Twenty consecutive discharges.

MR. ROSFNBAUM:—of which 20 of them were consecutive discharges for over four days absence, and every single

[40]

time that was the article cited, not the just cause provision. That's the only article cited in each of those, and each was sent to the union.

The president of the union appears as a copy on each one of those exhibits, and in eleven years no one has even grieved, and we have had successive contracts.

Now, is the arbitrator going to go back and redo that? Are we going to get back into that?

• • •

APPENDIX G

Reported Cases Involving Confirmation, Enforcement or Vacation of Arbitration Awards Under United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U. S. 593 (1960)[1]

1962-1981[2]

1. The survey of cases described herein is based on research from the following sources: Bureau of National Affairs, *Labor Relations Reporter* (Classification Guide Index System and Reporter Volumes), *LEXIS* search, and, where appropriate, *Shepard's Federal Labor Law Citations*. Cases include only those arising under Section 301 of the Labor Management Relations Act which expressly applied the *Enterprise* standard of review to the merits of an arbitration award. The cases listed do not include decisions which involved solely procedural matters, such as motions for clarification, remand, new evidence, and the like, or other matters not directly related to the merits of an award, such as the issue of post-award expiration of the contract, and the like. The cases listed do not include questions of arbitability unless such issues were reviewed under the *Enterprise* standard of review in the context of a suit to vacate or confirm an arbitration award. Affirmances without opinions of district court cases applying *Enterprise* are included. The citations do not include case histories other than petitions for certiorari, of which 20 were denied or dismissed, one was granted for reversal on other grounds, and one was granted and is pending.

2. The full names of several unions are sometimes abbreviated in the citations contained herein: International Union of United Automobile, Aerospace and Agricultural Implement Workers of America is sometimes abbreviated, "U. A. W."; International Union of Machinists and Aerospace Workers, "I. A. M."; International Brotherhood of Electrical Workers, "I. B. E. W."; Communications Workers of America, "C. W. A."

1962—4 decisions

Boot and Shoe Workers Union, Local 149 v. Faith Shoe Co., 201 F. Supp. 234 (M. D. Pa.)

Local 1241, I. B. E. W. v. Columbia Broadcasting System, Inc., 207 F. Supp. 423 (E. D. Pa.)

Selb Mfg. Co. v. I. A. M., Dist. No. 9, 305 F. 2d 177 (8th Cir.)

United Furniture Workers of America, Local 395 v. Virco Mfg. Corp., 257 F. Supp. 138 (E. D. Ark.)

1963—9 decisions

American Machine and Foundry Co. v. U. A. W., Local 116, 256 F. Supp. 161 (S. D. N. Y.)

Electric Speciality Co. v. Local 1069, I. B. E. W., 222 F. Supp. 314 (D. Conn.)

Greater Kansas City Laborers District Council, International Hod Carriers, Building and Common Laborers Union of America of Greater Kansas City, and Vicinity v. Builders Ass'n. of Kansas City, 217 F. Supp. 1 (W. D. Mo.)

H. K. Porter Co., Inc. v. United Saw, File and Steel Prods. Workers, etc., 217 F. Supp. 161 (E. D. Pa.)

Local 453, International Union of Electrical, Radio & Machine Workers v. Otis Elevator Co., 314 F. 2d 25 (2d Cir.)

Royal Industrial Union, Local 937, U. A. W. v. Royal McBee Corp., 217 F. Supp. 277 (D. Conn.)

U. S. A. v. Timken Roller Bearing Co., 324 F. 2d 738 (6th Cir.)

United Steelworkers of America v. Danville Foundry Corp., 46 CCH Lab. Cas. ¶ 18,119 (M. D. Pa.)

Winnebago Lodge 1947, International Ass'n. of Machinists v. Kiekhaefer Corp., 215 F. Supp. 611 (E. D. Wis.)

1964—7 decisions

H. K. Porter Co., Inc. v. United Saw, File and Steel Products Workers, etc., 333 F. 2d 596 (3rd Cir.)

Kansas City Luggage & Novelty Workers Union, Local 66 v. Neevel Luggage Manufacturing Co., Inc., 325 F. 2d 992 (8th Cir.)

Marble Products Co. of Georgia v. Local 155, etc., 335 F. 2d 468 (5th Cir.)

Minute Maid Co. v. Citrus, Cannery, Food Processing, etc., Workers, Local 444, 331 F. 2d 280 (5th Cir.)

Transport Workers Union of Phila., Local 234 v. Phila. Transportation Co., 228 F. Supp. 423 (E. D. Pa.)

Truck Drivers & Helpers Union Local 728 v. Georgia Highway Express, Inc., 328 F. 2d 93 (5th Cir.)

Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co., 330 F. 2d 562 (8th Cir.)

1965—6 decisions

American Bosch Arma Corp. v. International Union of Electrical, Radio and Machine Workers Local 794, 243 F. Supp. 493 (N. D. Miss.)

Local 7-644, Oil, Chemical and Atomic Workers, etc. v. Mobil Oil Co., 350 F. 2d 708 (7th Cir.)

Metal Products Workers Union, Local 1645 v. Torrington Co., 242 F. Supp. 813 (D. Conn.)

National Bro. Packing. & Dairy Workers v. Western Iowa Pork Co., 247 F. Supp. 663 (S. D. Iowa)

Sheet Metal Workers' International Union, Local Union 17 v. Aetna Steel Products Corp., 246 F. Supp. 236 (D. Mass.)

United Steelworkers of America v. Caster Mold and Machine Co., 345 F. 2d 429 (6th Cir.)

1966—10 decisions

International Brotherhood of Pulp, Sulfite and Paper Mill Workers, Local Union 874 v. St. Regis Paper Co., 362 F. 2d 711 (5th Cir.)

Lithographers & Photoengravers, etc. v. Rittenhouse Press, Inc., 259 F. Supp. 160 (E. D. Pa.)

Mine, Mill & Smelter Workers, etc., Local 16 v. Anaconda Co., 260 F. Supp. 445 (D. Mont.)

Newark Stereotypers' Union 18 v. Newark Morning Ledger Co., et al., 261 F. Supp. 832 (D. N. J.)

Safety Electrical Equipment Corp. v. Local 299, United Electrical, etc. Workers, 62 LRRM 2786 (D. Conn.)

Shahmoon Industries, Inc. v. United Steelworkers of America, et al., 263 F. Supp. 10 (D. N. J.)

Sheet Metal Workers' Int'l. Union, Local Union 17 v. Aetna Steel Products Corp., 359 F. 2d 1 (1st Cir.), *cert. denied* 385 U. S. 839.

Torrington Co. v. Metal Products Workers Union Local 1645, 362 F. 2d 677 (2d Cir.)

U. A. W., Local 985 v. W. M. Chace Co., 262 F. Supp. 114 (E. D. Mich.)

Western Iowa Pork Co. v. Nat. Bro. Packing. & Dairy Workers, 366 F. 2d 275 (8th Cir.)

1967—12 decisions

Baldwin-Montrose Chem. Co., Inc. v. Int'l. Union, United Rubber, etc. Workers, 383 F. 2d 796 (6th Cir.)

Chambers v. Beaunit Corp., 278 F. Supp. 62 (E. D. Tenn.)

Dallas Typographical Union No. 173 v. A. H. Belo Corp., 372 F. 2d 577 (5th Cir.)

Foster-Forbes Co. v. Glass Bottle Blowers, etc., 263 F. Supp. 729 (N. D. Ind.)

Hill v. ARO Corp., et al., 275 F. Supp. 482 (N. D. Ohio)

Kroger Co. v. International Brotherhood of Teamsters, Local 661, 380 F. 2d 728 (6th Cir.)

Lee, et al. v. Olin Mathieson Chemical Corp., et al., 271 F. Supp. 635 (W. D. Va.)

Local 13, ILWU v. Pacific Maritime Ass'n., 278 F. Supp. 755 (C. D. Cal.)

Local 342, U. A. W., et al. v. T. R. W., Inc., 65 LRRM 2597 (D. Tenn.)

Local 719, Amer. Bakery and Confectionery Workers, etc. v. National Biscuit Co., 378 F. 2d 918 (3d Cir.)

Ludwig Honold Mfg. Co. v. Fletcher, 260 F. Supp. 917 (E. D. Pa.)

United Steelworkers of America, Local Union 4936 v. Sharon Tube Co., 56 CCH Lab. Cas. ¶ 12,201 (W. D. Pa.)

1968—14 decisions

American Sterilizer Co. v. Local Union No. 832, etc., 278 F. Supp. 637 (W. D. Pa.)

Anaconda Co. v. Mine, Mill & Smelter Workers, etc., Local 16, 402 F. 2d 749 (9th Cir.)

Chambers v. Beaunit Corp., 404 F. 2d 128 (6th Cir.)

Joint Board of Cloak, Shirt and Dressmakers Union of International Ladies' Garment Workers Union v. Senco, Inc., 289 F. Supp. 513 (D. Mass.)

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New Orleans SS Ass'n. v. General Longshore Workers, etc., 389 F. 2d 369 (5th Cir.)

Safeway Stores v. American Bakery & Confectionery Workers International, Local 111, 390 F. 2d 79 (5th Cir.)

Teamsters Local Unions 745, et al. v. Braswell Motor Freight Lines, Inc., 392 F. 2d 1 (5th Cir.)

Textile Workers Union v. Textile Paper Products, Inc., 405 F. 2d 397 (5th Cir.)

U. A. W. v. T. R. W., Inc., 402 F. 2d 727 (6th Cir.), *cert. denied*, 395 U. S. 910

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1969—11 decisions

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District 50, U. M. W. v. Tenn Glad Industries, Inc., 297 F. Supp. 52 (E. D. Tenn.)

Eusebio Palacios, et al. v. Texaco Puerto Rico, Inc., 305 F. Supp. 1076 (D. P. R.)

Federal Labor Union No. 18887 v. Midvale-Heppenstall Co., 298 F. Supp. 574 (E. D. Pa.)

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Ludwig Honold Mfg. Co. v. Fletcher, 405 F. 2d 1123 (3d Cir.)

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New Orleans SS. Ass'n. v. I. L. A. Locals 1418 and 1419, 306 F. Supp. 134 (E. D. La.)

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Local 416, Sheet Metal Workers International Ass'n. v. ABC Contractors, Inc., 335 F. Supp. 646 (W. D. Wisc.)

Local Freight Drivers, Local No. 208, et al. v. Braswell Motor Freight Lines, Inc., 422 F. 2d 109 (9th Cir.), *cert. denied*, 400 U. S. 827

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1971—7 decisions

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Harris v. Chemical Leaman Tank Lines, 437 F. 2d 167 (5th Cir.)

Hilton Int'l. Co. v. Union de Trabajadores, etc., 337 F. Supp. 882 (D. P. R.)

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Textile Workers Union of America v. Cast Optics Corp., 80 LRRM 3183 (D. N. J.)

U. S. A. v. Amax Aluminum Mill Prods., Inc., 451 F. 2d 740 (9th Cir.)

1972—11 decisions

Bricklayers, etc., Union No. 7 of Nebraska v. Lueder Construction Co., 346 F. Supp. 558 (D. Neb.)

Int'l. Union of Operating Engineers, Local No. 450 v. Mid-Valley, Inc., 347 F. Supp. 1104 (S. D. Tex.)

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1973—10 decisions

Amalgamated Meat Cutters, etc., Local 81 v. Milwaukee Sausage Co., 84 LRRM 2571 (D. Wash.)

Boilermakers, Local 347 v. Pullman, Inc., Trailmobile Div., 357 F. Supp. 536 (E. D. Pa.)

Chauffeurs, Teamsters, Warehousemen and Helpers Local Union 446 v. Marathon County Farmers Union Co-operative, 83 LRRM 2995 (W. D. Wis.)

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Schlesinger, et al. v. Building Service Employees International Union Local 252, 367 F. Supp. 760 (E. D. Pa.)

Teamsters Local No. 25 v. Penn Transportation Corp., 359 F. Supp. 344 (D. Mass.)

Timkin Co. v. Local Union No. 1123, United Steelworkers of America, 482 F. 2d 1012 (6th Cir.) *cert. denied*, 414 U. S. 1004

Union Employers Division of Printing Industry of Washington, D. C., Inc. v. Columbia Typographical Union No. 101, 353 F. Supp. 1348 (D. D. C.)

1974—19 decisions

Amalgamated Clothing Workers of America v. Winfield Manufacturing Co., Inc., 89 LRRM 2206 (N. D. Ala.)

Botany Industries, Inc. v. New York Joint Board, Amalgamated Clothing Workers of America, 375 F. Supp. 485 (S. D. N. Y.)

I. B. E. W., Local Union 278 v. Jetero Corp., 496 F. 2d 661 (5th Cir.)

ILWU Local 142 v. Land & Construction Co., Inc., 498 F. 2d 201 (9th Cir.)

Keystone Printed Specialities Co., Inc. v. Scranton Printing, Pressmen and Assistants' Union No. 119, 386 F. Supp. 416 (M. D. Pa.)

Koehring Co. v. IUE, Local 699, 87 LRRM 2472 (S. D. Ohio)

Local Union No. 179, United Textile Workers of America, 374 F. Supp. 633 (E. D. Mo.)

Local Union No. 251 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Narragansett Improvement Co., 86 LRRM 3086 (D. R. I.)

Local Union No. 251 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Narragansett Improvement Co., 503 F. 2d 309 (1st Cir.)

Local 769, Bakery & Confectionery Workers International Union of America v. Cotton Baking Co., Inc., 377 F. Supp. 1172 (W. D. La.)

Proctor & Gamble Manufacturing Co. v. Independent Oil and Chemical Workers, 386 F. Supp. 213 (D. Md.)

Retail Store Employees Union, Local 782 v. Sav-On Groceries, 88 LRRM 3204 (D. N. M.)

Seward v. Brown & Williamson Tobacco Corp., 88 LRRM 2381 (W. D. Ky.)

Timkin Co. v. United Steelworkers of America, 492 F. 2d 1178 (6th Cir.)

Truck Drivers, Chauffeurs & Helpers Local Union No. 100 v. Quick-Freeze Cold Storage, Inc., et al., 375 F. Supp. 725 (S. D. Ohio)

U. A. W. v. White Motor Corp., 505 F. 2d 1193 (8th Cir.)

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Yakima Newspaper Guild Local No. 27 of the Newspaper Guild v. Republic Publishing Co., 375 F. Supp. 945 (E. D. Wash.)

1975—18 decisions

Amalgamated Clothing Workers of America v. Winfield Mfg. Co., Inc., 90 LRRM 2890 (5th Cir.)

Amalgamated Meat Cutters, etc. v. Cross Brothers Meat Packers, Inc., 518 F. 2d 1113 (3rd Cir.)

Bakery and Confectionery Workers, etc. v. Cotton Baking Co., 514 F. 2d 1235 and 520 F. 2d 943 (5th Cir.), *cert. denied* 423 U. S. 1055

Central Mootr Express, Inc. v. General Drivers, Warehousemen and Helpers, Local Union No. 89, 407 F. Supp. 1217 (W. D. Ky.)

C. W. A. v. Western Electric Co., 397 F. Supp. 1318 (N. D. Ga.)

Daisey v. Lindy's Coffee Shop, Inc., 397 F. Supp. 767 (C. D. Cal.)

Federation of Telephone Workers of Pa. v. The Bell Telephone Co. of Pa.; The Bell Telephone Co. of Pa. v. Federation of Telephone Workers of Pa., 406 F. Supp. 1201 (E. D. Pa.)

Hellman v. Program Printing, Inc., 400 F. Supp. 915 (S. D. N. Y.)

Keystone Printed Specialties Co. v. Scranton Printing, etc., 517 F. 2d 1398 (3rd Cir.) *affirming without opinion*, 386 F. Supp. 416 (M. D. Pa. 1974)

Kirby v. Spartan Stores, Inc., 88 LRRM 3072 (D. Mich.)

Koehring Co. v. IUE, Local 699, 513 F. 2d 632 (6th Cir.), *affirming without opinion* 87 LRRM 2472 (S. D. Ohio 1974)

Local 369, Bakery & Confectionery Workers, etc. v. Cotton Baking Co., 514 F. 2d 1235 (5th Cir.)

Master Sheet Metal Workers, etc., Ass'n. v. Local Union No. 17, 397 F. Supp. 1372 (D. R. I.)

NF&M Corp. v. U. S. A., 88 LRRM 3345 (W. D. Pa.)

NF&M Corp. v. U. S. A., 524 F. 2d 756 (3rd Cir.)

Retail Store Employees Union, Local 782 v. Sav-On Groceries, 508 F. 2d 500 (10th Cir.)

Staffman's Organizing Committee v. United Steelworkers of America, 399 F. Supp. 102 (W. D. Mich.)

Television & Radio Artists v. National Broadcasting Co., Inc., 89 LRRM 2191 (S. D. N. Y.)

1976—21 decisions

Amalgamated Meat Cutters and Food Handlers of North America, District Union 653-653A v. Landy Packing Co., 96 LRRM 2874 (D. Minn.)

Bell Tel. Co. v. Federation of Tel. Workers, 546 F. 2d 415 (3d Cir.), *cert. denied*, 430 U. S. 969, *affirming without opinion*, 406 F. Supp. 1201 (E. D. Pa. 1975)

College Hall Fashions, Inc. v. Phila. Jt. Board, etc., 408 F. Supp. 722 (E. D. Pa.)

General Drivers, Helpers and Truck Terminal Employees, Local No. 120 v. Sears, Roebuck & Co., 535 F. 2d 1072 (8th Cir.)

General Teamsters, Chauffeurs and Helpers, Local Union No. 249 v. Potter-McCune Co., 412 F. Supp. 8 (W. D. Pa.)

Hotel, Motel, Restaurant and Hi-Rise Employees and Bartenders Union, Local 355 v. Fontainebleau Hotel Corp., 423 F. Supp. 83 (S. D. Fla.)

I. A. M., District 776 v. Texas Steel Co., 538 F. 2d 1116 (5th Cir.), *cert. denied*, 429 U. S. 1095

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 6 v. Saga Foods, Inc., et al., 407 F. Supp. 1247 (N. D. Ill.)

Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n., 409 F. Supp. 233 (W. D. Mo.)

Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n., 532 F. 2d 615 (8th Cir.)

Keane, et al. v. Eastern Freightways, Inc., 78 CCH Lab. Cas. ¶ 11,427 (D. N. J.)

Kellogg Co. v. International Printing Pressmen and Associates Union of North America, et al., 410 F. Supp. 207 (W. D. Mich.)

Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Inc. v. Jacobs Transfer Co., Inc., 407 F. Supp. 125 (D. D. C.)

Meat & Allied Food Workers Local No. 248 v. Packerland Packing Co., Inc., 411 F. Supp. 1280 (E. D. Wisc.)

Monogahela Power Co. v. Local No. 2332, International Brotherhood of Electrical Workers, 566 F. 2d 1196 (4th Cir.)

Siskey v. General Teamsters, etc., Local No. 261, 419 F. Supp. 48 (W. D. Pa.)

Sun Oil Co. of Pa. v. Local 8-901, Oil, Chemical, and Atomic Workers' International Union, 421 F. Supp. 1376 (E. D. Pa.)

Truck Driver's Local Union No. 807 v. The Bohack Corp., 541 F. 2d 312 (2nd Cir.), *cert. denied,* 439 U. S. 825

Victor Electric Wire and Cable Corp. v. International Brotherhood of Electrical Workers, Local 2014, 411 F. Supp. 338 (D. R. I.)

Victor Electric Wire and Cable Corp. v. International Brotherhood of Electrical Workers, Local 2014, 546 F. 2d 413 (1st Cir.), *affirming without opinion,* 411 F. Supp. 338

Western Elec Co. v. C. W. A., 409 F. Supp. 161 (D. Md.)

1977—19 decisions

Bernard v. McLean Trucking Co., 429 F. Supp. 284 (D. Kans.)

Bohack Corp. v. Truck Drivers Local Union No. 807 etc., 567 F. 2d 237 (2d Cir.), *cert. denied,* 439 U. S. 825

Bohack Corp. v. Truck Drivers Local No. 807, International Brotherhood of Teamsters etc., 431 F. Supp. 646 (E. D. N. Y.)

Capital City Tel. Co. v. C. W. A., 97 LRRM 2394 (W. D. Mo.)

Celmer v. Luden's, Inc. and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 429, 427 F. Supp. 991 (E. D. Pa.)

General Warehousemen and Helpers Local 767 v. Standard Brands, Inc., 560 F. 2d 700 (5th Cir.), *cert. dismissed,* 443 U. S. 913

Glaziers Local Union 1184 v. Pittsburgh Plate Glass Industries, Inc., 97 LRRM 2083 (M. D. Tenn.)

Lewis v. Greyhound Lines—East, et al., 555 F. 2d 1053 (D. C. Cir.), *cert. denied,* 434 U. S. 997

Local 771, I. A. T. S. E. v. RKO General, Inc., 546 F. 2d 1107 (2nd Cir.)

Mistletoe Express Service v. Motor Expressmen's Union, 566 F. 2d 692 (10th Cir.)

Morysville Body Works, Inc. v. United Steelworkers of America, Local Union No. 6622, 96 LRRM 3205 (E. D. Pa.)

Paperhandlers Union No. 1, etc. v. U. S. Trucking Corp., 441 F. Supp. 469 (S. D. N. Y.)

Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operator's Warehouse Independent Truck Drivers Union, Local No. 1, 434 F. Supp. 83 (W. D. La.)

Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operator's Warehouse Independent Truck Drivers Union, Local No. 1, 438 F. Supp. 164 (W. D. La.) (on rehearing)

Santos v. Dist. Council of N. Y. City and Vicinity, etc., 547 F. 2d 197 (2nd Cir.)

Service Personnel and Employees of the Dairy Industry, Teamsters Local Union No. 205, etc., et al. v. Carl Colteryahn Dairy, Inc., 436 F. Supp. 341 (W. D. Pa.)

Sheet Metal Workers International Ass'n, Local Union No. 49 v. Los Alamos Constructors, Inc., 550 F. 2d 1258 (10th Cir.)

Union de Tronquistas de Puerto Rico, Local 901, et al. v. Flagship Hotel Corp., 554 F. 2d 8 (1st Cir.)

Western Elec. Co. v. C. W. A., 554 F. 2d 135 (4th Cir.)

1978—15 decisions

IN THE MATTER OF THE ARBITRATION BETWEEN *Behring International, Inc. and Local 295 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 449 F. Supp. 513 (E. D. N. Y.)

Capital City Tel. Co. v. C. W. A., 575 F. 2d 655 (8th Cir.)

Chicago Typographical Union No. 16 v. Field Enterprises, Inc., Slip Opinion (N. D. Ill., No. 78 C 1907)

Crusco, et al. v. Fisher & Brother, Inc. and Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 458 F. Supp. 413 (S. D. N. Y.)

Falstaff Brewing Corp. v. Local 153, International Brotherhood of Teamsters Local Union No. 153, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Falstaff Brewing Corp., 479 F. Supp. 850 (D. N. J.)

General Warehousemen and Helpers Local 767 v. Standard Brands, Inc., 579 F. 2d 1282 (5th Cir.), *cert. dismissed*, 441 U. S. 957, 441 U. S. 913

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Kewanee Machinery Div., Chromalloy American Corp. v. Local Union No. 21, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 450 F. Supp. 1074 (E. D. Mo.)

National Ass'n. of Letter Carriers v. U. S. Postal Service, 590 F. 2d 1171 (D. C. Cir.)

Orange Belt District Council of Painters No. 48 v. Maloney Specialities, Inc., 98 LRRM 3193 (C. D. Calif.)

Texas City Tankers Corp. v. National Maritime Union of America, Slip Opinion (S. D. N. Y. Case No. 76 CIV 706)

United Steel Workers v. Latrobe Steel Co., 452 F. Supp. 63 (W. D. Pa.)

United Steelworkers of America and Local 3125, United Steelworkers of America v. Interpace Corp., 447 F. Supp. 387 (W. D. Pa.)

Western Elec. Co. v. C. W. A., 450 F. Supp. 876 (E. D. N. Y.)
Western Elec. Co. v. C. W. A., 591 F. 2d 1333 (2d Cir.)

1979—21 decisions

Aircraft Mechanics Fraternal Ass'n v. Ozark Airlines, Inc., 598 F. 2d 1155 (8th Cir.)
Boise Cascade Corp. v. United Steelworkers of America, 588 F. 2d 127 (5th Cir.), *cert. denied* 444 U. S. 830
Bronx Lebanon Hospital Center v. District 1199, National Union of Hospital and Health Care Employees, R. W. D. S. U., 87 CCH Lab. Cas. ¶ 11,732 (S. D. N. Y.)
Detroit Coil Co. v. I. A. M., Lodge No. 82, 594 F. 2d 575 (6th Cir.), *cert. denied*, 444 U. S. 840
Falstaff Brewing Corp. v. Local Union No. 153, etc., 609 F. 2d 501 (3rd Cir.), *cert. denied*, 444 U. S. 1079, *affirming without opinion*, 479 F. Supp. 850 (D. N. J. 1978)
General Teamsters, etc., Local 162 v. Mitchell Brothers Truck Lines, 104 LRRM 2318 (D. Ore.)
Graphic Arts International Union, Local 97-B v. Haddon Craftsmen, Inc.; Haddon Craftsmen, Inc. v. Graphic Arts International Union, Local 97-B, 489 F. Supp. 1088 (M. D. Pa.)
International Brotherhood of Electrical Workers, Local Union No. 474 v. Sammarco Electric Co., Inc., et al.; Memphis Electrical Workers Health and Welfare Trust Fund, et al. v. Sammarco Electric Co., Inc., 100 LRRM 2629 (W. D. Tenn.)
International Longshoremen's and Warehousemen's Union Local 142, et al. v. Hilo Coast Processing Co., 87 CCH Lab. Cas. ¶ 11,793 (D. Hawaii)

International Sound Technicians Local 695, I. A. T. S. E. v. GJL Productions, 471 F. Supp. 1085 (C. D. Cal.)

Kewanee Machinery v. Local No. 21, International Brotherhood of Teamsters, etc., 593 F. 2d 314 (8th Cir.)

Landy Packing Co., Northwestern Hide Processing Co., Inc. and Northwestern By-Products Co. v. Amalgamated Meat Cutters and Food Handlers of North America, District Local 653-653A, 471 F. Supp. 1218 (D. Minn.)

Louisiana-Pacific Corp. v. I. B. E. W., Local Union 2294, 600 F. 2d 219 (9th Cir.)

Mack Transportation Co. v. Local 773, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 476 F. Supp. 165 (E. D. Pa.)

Marley Cooling Tower Co. v. Shopmen's Local No. 682, 103 LRRM 2873 (W. D. Ky.)

Mobil Oil Corp. v. Local 8-766, Oil, Chemical and Atomic Workers I. U., 600 F. 2d 322 (1st Cir.)

Peter Cooper Corp. v. United Electrical, Radio and Machine Workers of America, Local 1132, 472 F. Supp. 692 (E. D. Wisc.)

Public Service Employees Union, Local No. 80, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Rochdale Village, Inc., 102 LRRM 2470 (E. D. N. Y.)

Public Service Employees Union, Local No. 80, etc. v. Rochdale Village, Inc., 605 F. 2d 1290 (2d Cir.)

Storer Broadcasting Co. v. American Federation of Television and Radio Artists, Cleveland Local, 600 F. 2d 45 (6th Cir.)

Warehouse Employees Local 169 v. Acme Markets, Inc., 473 F. Supp. 709 (E. D. Pa.)

1980—39 decisions

Advance Publications, Inc. v. Newspaper Guild of New York, Local 3, 616 F. 2d 716 (2d Cir.)

Aluminum Workers International Union and Local No. 250 v. Chromalloy American Corp., 489 F. Supp. 536 (N. D. Miss.)

Botica, as Agent for the Structural Iron Workers Local No. 1 Welfare Fund, et al. v. Floyd Steel Erectors, Inc., 485 F. Supp. 334 (N. D. Ill.)

Chauffeurs, Teamsters, etc., Local Union No. 878 v. Coca-Cola Bottling Co., 613 F. 2d 716 (8th Cir.), *cert. denied,* 446 U. S. 988

Federation of Westinghouse Independent Salaried Unions, et al. v. Westinghouse Electric Corporation, 482 F. Supp. 308 (W. D. Pa.)

Federation of Westinghouse Ind. Salaried Unions v. Westinghouse Electric Corp., 631 F. 2d 725 (3rd Cir.), *affirming without opinion,* 482 F. Supp. 308 (W. D. Pa.)

F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781, 629 F. 2d 1204 (7th Cir.), *cert. denied,* 451 U. S. 937

Hawkins v. Babcock & Wilcox Co., 105 LRRM 3438 (N. D. Ohio)

I. & F. Corp. v. International Ass'n. of Heat and Frost Insulators and Asbestos Workers, Local 8, et al., 493 F. Supp. 147 (S. D. Ohio)

I. A. M., District Lodge No. 50, Local Lodge No. 389 v. San Diego Marine Construction Corp., 620 F. 2d 736 (9th Cir.)

International Brotherhood of Firemen and Oilers v. Nestle Co., 630 F. 2d 314 (6th Cir.)

International Ladies' Garment Workers' Union, Local No. 111 v. Dee Ville Blouse Co., Inc., 486 F. Supp. 1253 (E. D. Pa.)

Jarrell, et al. v. Wilson Warehouse Co., Inc., 91 CCH Lab. Cas. ¶ 12,905 (M.D. La.)

Johns-Manville Sales Corp. v. I. A. M. Local Lodge 1609, 621 F. 2d 756 (5th Cir.)

Johnson Bronze Co. v. U. A. W., 621 F. 2d 81 (3rd Cir.)

Knox Porcelain Corp. v. Teamsters Local Union 519, Knoxville and Vicinity, 504 F. Supp. 284 (E. D. Tenn.)

Landy Packing Co., et al., v. Amalgamated Meat Cutters, etc., 627 F. 2d 881 (8th Cir.)

Mack Transp. Co. v. Local 773, Teamsters, 622 F. 2d 579 (3d Cir.), *affirming without opinion*, 476 F. Supp. 165 (E. D. Pa. 1979)

Metromedia, Inc. v. Local 819, International Alliance of Theatrical Stage Employees, 105 LRRM 2908 (D. D. C.)

Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 482 F. Supp. 1238 (E. D. Wisc.)

Morse's Food Mart of New Bedford, Inc. v. District Union Local 2, United Food and Commercial Workers, Slip Opinion (D. Mass., Civ. A. No. 80-1004-MA)

New Orleans Steamship Ass'n., et al. v. General Longshore Workers, ILA Local Union No. 1418, 486 F. Supp. 409 (E. D. La.)

New Orleans Steamship Ass'n., et al. v. General Longshore Workers, etc., 626 F. 2d 455 (5th Cir.), *cert. granted*, 68 L. Ed. 2d 223 (1982)

Orange Belt District Council of Painters No. 48 v. Maloney Specialties, Inc., 639 F. 2d 487 (9th Cir.)

Piggly Wiggly Operators', etc. v. Piggly Wiggly Operators', etc., 611 F. 2d 580 (5th Cir.)

Plumbers' Pension Fund, Local 130, U. S.; Plumbers' Welfare Fund, Local 130, U. S.; The Trust Fund for Apprentice and Journeyman Education and Training, Local 130, U. S.; and the Plumbing Council of Chicagoland, Slip Opinion (N. D. Ill., No. 79 C 4652)

Pratt Institute v. United Federation of College Teachers, etc., 103 LRRM 3027 (E. D. N. Y.)

Sear, et al. v. Cadillac Automobile Co. of Boston and Metropolitan Automobile Salesmen, Local 122, 501 F. Supp. 1350 (D. Mass.)

Shearson Hayden Stone, Inc. v. Paul Liang, 493 F. Supp. 104 (N. D. Ill.)

Sverdrup/ARO, Inc. v. International Ass'n. of Machinists, etc., 532 F. Supp. 143 (E. D. Tenn.)

Teamsters, Local Union No. 135 v. Jefferson Trucking Company, Inc., 628 F. 2d 1023 (7th Cir.), *cert. denied*, 449 U. S. 1125

Teamsters Local Union No. 284, et al. v. Maremont Corp., 515 F. Supp. 168 (S. D. Ohio)

United Ass'n of Journeymen and Apprentices of the Plumbing & Pipefitting Industry Local 198 v. Nichols Construction Corp., 502 F. Supp. 465 (M. D. La.)

United Automobile Workers, Local 197 v. TRW, Inc., 104 LRRM 2756 (D. Conn.)

United Steelworkers of America, et al. v. Sunshine Mining Co., 103 LRRM 2822 (D. Idaho)

Warehouse Employees v. Acme Markets, Inc., 620 F. 2d 291 (3rd Cir.), *affirming without opinion*, 473 F. Supp. 709 (E. D. Pa. 1979)

Washington Teachers' Union, Local 6 v. National Child Day Care Ass'n., 90 CCH Lab. Cas. ¶ 12,636 (D. D. C.)

Waverly Mineral Products Co. v. U. S. A., 633 F. 2d 682 (5th Cir.)

IN THE MATTER OF THE ARBITRATION BETWEEN *Zeigler Coal Co. and District 12, United Mine Workers*, 484 F. Supp. 445 (C. D. Ill.)

1981—30 decisions

Aeronautical Machinists Lodge 709, I. A. M. & A. W. v. Lockheed-Georgia Co., 521 F. Supp. 1327 (N. D. Ga.)

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Burkart Randall v. Lodge No. 1076, I. A. M., 648 F. 2d 462 (7th Cir.)

Chicago Cartage Company v. International Brotherhood of Teamsters, Local 710, et al., 659 F. 2d 825 (7th Cir.)

Davis, Winthrop F., v. Chevy Chase Financial Limited, 667 F. 2d 160 (D. C. Cir.)

Francesco's B., Inc. v. Hotel and Restaurant Employees and Bartender's Union, etc., 659 F. 2d 1383 (9th Cir.)

Grand Rapids Die Casting Corp. v. Local Union No. 159, U. A. W., 507 F. Supp. 1355 (W. D. Mich.)

International Brotherhood of Painters, etc. Local Union No. 756 v. Sherwin-Williams Co., 107 LRRM 2614 (N. D. Tex.)

Jackson Purchase Rural Elec. Coop. Ass'n. v. Local Union 816, I. B. E. W., 646 F. 2d 264 (6th Cir.)

Local 1020 of the United Brotherhood of Carpenters and Joiners of America v. FMC Corp., 658 F. 2d 1285 (9th Cir.)

Local No. P-1236, Amalgamated Meat Cutters, etc. v. Jones Dairy Farm, 519 F. Supp. 1362 (W. D. Wisc.)

Manolo E. Tolentino v. Charles Erickson, Wented Realty Corp., et al., 525 F. Supp. 812 (E. D. N. Y.)

Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F. 2d 386 (7th Cir.), *cert. denied* 102 S. Ct. 144

Northshore Investments, Ltd. v. Directors Guild of America, 108 LRRM 3011 (C. D. Cal.)

Oil Chemical and Atomic Workers International Union, Local No. 4-16000 v. Ethyl Corp., 664 F. 2d 1044 (5th Cir.)

Otis Elevator Co. v. U. A. W., Local 909, 92 CCH Lab. Cas. ¶ 12,919 (S. D. N. Y.)

Perma-Line Corp. v. Sign, Pictorial and Display Union, etc., 639 F. 2d 890 (2d Cir.)

Rainbow Glass Co. v. Local Union No. 610, International Brotherhood of Teamsters, 663 F. 2d 814 (8th Cir.)

Ryan-Walsh Stevedoring Co., Inc. v. General Longshore Workers Union, Local No. 3000, 509 F. Supp. 463 (E. D. La.)

Sear, et al. v. Cadillac Automobile Co. of Boston, 654 F. 2d 4 (1st Cir.)

Shearson Hayden Stone, Inc. v. Liang, 653 F. 2d 310 (7th Cir.)

Simpson and International Brotherhood of Teamsters, etc., Local 617 v. APA Transport Corp., 108 LRRM 2754 (D. N. J.)

Sugar Creek Packing, Inc. v. Amalgamated Food and Allied Workers District Union 430, 526 F. Supp. 809 (S. D. Ohio)

Sui De Puerto Rico, S. I. U. v. Blairmoor De Puerto Rico, Inc., 513 F. Supp. 849 (D. P. R.)

Sunbeam Appliance Co. v. I. A. M., Dist. No. 8, 511 F. Supp. 505 (N. D. Ill.)

Syufy Enterprises v. Northern Calif. State Ass'n., etc., 631 F. 2d 124 (9th Cir.) *cert. denied* 451 U. S. 983

United Steelworkers of America v. American Smelting and Refining Co., 648 F. 2d 863 (3rd Cir.), *cert. denied*, 102 S. Ct. 567

Warehouse, Mail Order, Office, Technical and Professional Employees, Local No. 743 v. Carl Gorr Color Card, Inc., 512 F. Supp. 213 (N. D. Ill.)

Wren v. Sletten Construction Co., 654 F. 2d 528 (9th Cir.)

W. R. Grace and Co. v. Local Union No. 759, United Rubber Workers, etc., 652 F. 2d 1248 (5th Cir.), *appeal pending*

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No. 81-2137

IN THE

Supreme Court of the United States

October Term, 1981

ARCO POLYMERS, INC.,

Petitioner,

vs.

LOCAL 8-74, a/w THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS.

	Page
Opinions Below	1
Jurisdiction	2
Counter Statement of the Case	2
Reasons for Denying the Writ:	
I. The U. S. Court of Appeals for the Third Circuit correctly applied this Court's "Steelworker's Trilogy" decisions by focusing their scope of review, relative to the arbitrator's treatment of past practices, to whether the arbitrator's award drew its essence from the collective bargaining agreement	4
II. The Third Circuit correctly applied this Court's holding in the *United Steel Workers vs. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) in upholding the arbitrator's interpretation of the agreement despite the possibility that the Court's interpretation of the contract could have been different from that of the arbitrator	8
a. The Third Circuit correctly refused to overturn the arbitrator's award on the basis of ambiguity and the opinion	9
b. The Third Circuit correctly upheld the arbitrator's interpretation of two clauses pertaining to discharges in favor of the necessity of the company to show "just cause"	10
c. The Third Circuit correctly upheld the arbitrator's interpretation of when the discharge of an employee is subject to company discretion	12
III. The Third Circuit reinforces the standard for arbitration judicial review consistent with this Court's prior decisions	13
Conclusion	16

Page

TABLE OF AUTHORITIES.

Cases:

Amanda Bent Bolt Co. v. International Union, United Automobile, Aerospace, Agricultural Implement Workers of America, Local 1549, 451 F. 2d 1277 (6th Cir. 1971) 10

Amoco Oil Company v. Oil, Chemical and Atomic Workers International Union Local 7-1, Inc., 548 F. 2d 1288 (7th Cir. 1977) 11

Arco Polymer, Inc. v. Local 274, 671 F. 2d 752 (3rd Cir. 1982) 4,5,7,9,10,12

F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union Local No. 781, 629 F. 2d 1204 (7th Cir. 1980) 11

I.A.M. v. San Diego Marine Construction Corporation, 620 F. 2d 736 (10th Cir. 1980) 12,13

Johnson Bronze Co. v. International Union of A.A.A.I.W.A., 621 F. 2d 81 (3rd Cir. 1980) 6,8

Kewanee Machinery v. Local 21, I.B.T., 593 F. 2d 314 (8th Cir. 1979) 13

Ludwig Honold Manufacturing Co. v. Fletcher, 405 F. 2d 1123 (3rd Cir. 1969) 6,8,11

Mistletoe Express Service v. Motor Expressman's Union, 566 F. 2d 692 (10th Cir. 1977) 12

N. F. & M. Corp. v. United Steelworkers of America, 524 F. 2d 756 (3rd Cir. 1975) 9

Textile Workers Union v. American Thread Co., 291 F. 2d 894 (4th Cir. 1961) 11,13

Timken Co. v. United Steelworkers of America, 492 F. 2d 1178 (6th Cir. 1974) 13

Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co., 330 F. 2d 562 (8th Cir. 1964) 11

Page

United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593 (1960) 4,6,7,8,9,10,12

United Parcel Service v. Mitchell, ____ U.S. ____, 101 S. Ct. 1559 (1981) 14,15

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 5,6,7

Virgin Islands Nursing Association Bargaining Unit v. Schneider, 668 F. 2d 221 (3rd Cir. 1981) 9

Statutes:

Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185 2

Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. §§10 and 11 2

IN THE

Supreme Court of the United States

October Term, 1981

No. _____

ARCO POLYMERS, INC.,

Petitioner,

vs.

LOCAL 8-74, a/w THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals is officially reported as 671 F.2d 752 (3d Cir. 1982). A Petition for Rehearing of the Court of Appeals decision was denied on March 18, 1982. The Opinion of the U. S. District Court for The Western District of Pennsylvania is reported at 517 F.Supp. 681 (W.D.Pa. 1981). The award of the arbitrator is unpublished and appears as Appendix D to the Petition for Certiorari.

Jurisdiction

The judgment of the U. S. Court of Appeals for the Third Circuit was entered on February 22, 1982. Petitioner's Petition for Certiorari was timely filed within ninety (90) days of the date of entry of final decision. Jurisdiction of this Court is invoked under 29 U.S.C., Section 1254 (1). Respondent's opposition to Petition for Certiorari has been timely filed within thirty (30) days after receipt of Petition for Writ of Certiorari. Rule 22 of the U. S. Supreme Court Rules.

Counter Statement of the Case

a. Petitioner, ARCO POLYMERS, INC., (hereinafter referred to as "Employer") filed an action under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C., Section 185 and Section 10 and 11 of the Federal Arbitration Act, 9 U.S.C., Sections 10 and 11 against Respondent, LOCAL 8-74, a/w THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, (hereinafter referred to as "Union") in the United States Court for the Western District of Pennsylvania at Civil Action No. 80-1102H. The Action was filed to vacate or modify the Labor Arbitration Award of Robert J. Wagner, dated June 18, 1980, with respect to a grievance filed by bargaining unit employee, Larry Anderson (hereinafter referred to as "Grievant").

The Union filed an Answer and Counter Claim seeking enforcement of the arbitration award and damages for the employer's failure to comply with the award.

Cross motions for summary judgment were filed. The District Court granted the Employer's motion and denied the Union's motion and ordered the arbitration award vacated. The Union thereupon perfected an appeal to the U. S. Court of Appeals to the Third Circuit at No. 81-2420.

The Third Circuit reversed the District Court and remanded the case for further proceedings.

After denial of Employer's Request for Reargument, the Employer filed the Petition for Writ of Certiorari to this Honorable Court.

b. Counter Statement of the Facts.

Employer and Union were parties to a collective bargaining agreement covering the workers employed at the Employer's Monaca, Pennsylvania plant. Grievant has been employed in the bargaining unit as a material handler. By letter dated March 7, 1980, the grievant was discharged by the Employer based upon alleged violations of Article XXVI, Section B, sub-paragraph B, sub-paragraph 1 of the Labor Agreement.

Grievant filed a grievance over his discharge and the grievance was processed through the contractual grievance procedure culminating in final and binding arbitration. The arbitration hearing was held on May 20, 1980, before Arbitrator Robert J. Wagner. On June 8, 1980, the arbitrator issued an award ordering immediate reinstatement of the grievant to his former position without loss of seniority or other benefits but without back pay. Despite the arbitrators order of immediate reinstatement, the Employer did not permit the grievant to return to his job until July 11, 1980.

REASONS FOR DENYING THE WRIT

I. The U. S. Court of Appeals for the Third Circuit correctly applied this Court's "Steelworker's Trilogy" decisions by focusing their scope of review, relative to the arbitrator's treatment of past practices, to whether the arbitrator's award drew its essence from the collective bargaining agreement.

Employer's Petition for Writ of Certiorari argues that the Third Circuit's opinion, *Arco Polymer, Inc. vs. Local 8-74*, 671 F.2d 752 (3rd cir. 1982), (Petition Appendix A) characterizes a company's past practices as incident to a determination of an arbitration award (Petition 7). Employer also claims that the Third Circuit's opinion mandates that the relevancy of past practices is contingent upon express acceptance of the practice by the Union (Petition 9-12). The whole of Employer's argument comes as a result of a tortured reading of the Third Circuit opinion in a effort to portray the decision as one which ignores this Court's holding in *United Steel Worker's of America vs. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

The language in the Third Circuit which Petitioner relies upon reads:

> "The company argues that its uniform past practice of discharging employees who violate Article XXVI, Section B (1) is an independent ground for vacating the award. There is no doubt that such a practice is relevant to the questions facing the arbitrator, See *Warrior and Gulf*, 363 U.S. at 581-82, 80 S.Ct. at 1352-53 ("(A)rbitrator's Source of Law (includes) the Industrial Common Law-The Practices of the Industry and the Shop . . . ."), and perhaps to the Court where the arbitrator has looked to those practices as part of the agreement, see N F & M Corp., 524 F. 2d at 759; *H.K. Porter Company vs. United Saw Workers*, 333 F. 2d 596, 600 (3rd cir. 1964). We do not, however, think it is relevant to the question before this Court: whether the arbitrator's

> award draws its essence from the contract. But see *Timken vs. Local 1123, United Steel Workers,* 482 F. 2d 1012, 1014 (6th cir. 1973) (vacating an arbitration award where arbitrator's award was contrary to shop practices). The only way this uniform past practice could have any relevance to our inquiry is if the company could show that it was a uniform past practice accepted by the Union to discharge all employees who had been found absent for more than four (4) days without good and sufficient cause. The statistic alone does not preclude a finding that employees may have been absent without good and sufficient cause yet not discharged for lack of 'just cause' " *Arco Polymers, Inc.,* 671 F.2d at 758.

Employer, in support of its argument, draws upon this Court, observation in *Warrior and Gulf* that an arbitrator's knowledge of industry and the shop place him or her in a superior position, *vis-a-vis* a judge, in deciding the outcome of an arbitrable grievance. The argument put forth by the Petitioner is best understood by inspection of the passage in *Warrior and Gulf* with emphasis as supplied by the Petitioner:

> "The labor arbitrators *source of law* is not confined to the express provisions of the contract, as the *industrial common law*-the practices of the industry in the shop-*is equally a part of the collective bargaining agreement* although not expressed in it." (Petition 8) *United Steel Workers of America vs. Warrior and Gulf Navigation Company,* 363 U.S. 574 (1960).

The essence of the Employer's argument is that this Court's characterization in the passage of "source of law" and industrial "common law" creates acceptance of language which requires a reviewing court, under *Enterprise,* to rule upon past practices in terms of the weight given to them by the arbitrator's decision. (Petition 8-9).

However, *Warrior and Gulf* makes clear that the Employer's preferred scope of view is exactly what a judge is not qualified to do:

> "The ablest judge cannot be expected to bring the same experience to bear upon the determination of a grievance because he cannot be similarly informed." *Warrior and Gulf*, 363 U.S. at 582.

In essence, the Employer is proposing a scope of review broader than the so-called "essence test". Petitioner is suggesting that the District Court had the right to decide whether or not the past practice existed and its relevance with respect to the grievance in a case where the District Court did not even have a copy of the transcript of proceedings before the arbitrator or any evidence whatsoever of such past practice. The Union is not suggesting that the District Court should have had a copy of the transcript of the proceedings, however, Petitioner implies that the District Court was privy to the same evidence submitted to the arbitrator. Past practices, being a legitimate part of the collective bargaining process, was incorporated into the arbitrator's decision making process in interpreting the agreement. The reviewing Court does not single out past practices, as Petitioner would have it do, for relevancy under the holding of *Enterprise* is solely within the arbitrator's province. Petitioner does not assert that the arbitrator failed to take into account the past practices of the employer.[1]

A Court's review of the award is limited to a determination of whether the award "draws its essence" from the agreement. The Court cannot disturb the award unless the arbitrator's decision represents a manifest disregard of the agreement. *Ludwig Honold Mfg. Co. vs. Fletcher*, 405 F.2d 1123 (3rd cir. 1969); *Johnson Bronze Co. vs. International Union of AAAIWA*, 621 F.2d 81 (3rd cir. 1980).

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[1] The past practice which the company believes to be key to their case, the number of employees discharges pursuant to Article XXVI, §B(1) for the years 1968-1980, was duly noted in the arbitrators opinion at A36 of Appendix B to Petition.

Petitioners misplaced emphasis on certain passages from *Warrior amd Gulf and Enterprise* if accepted as the standard, would result in a conclusion entirely inconsistant with the standards of judicial review promulgated by this Court in the "Steel Workers Trilogy" decision. The Employer would have the Third Circuit review the arbitrator's decision by weighing the merits of the arbitrator's treatment of past practices. The Third Circuit correctly, under *Enterprise*, focused on the issue of whether "the arbitrator's award can possibly derive from an interpretation and application of the clauses of the agreement." *Arco Polymers, Inc.*, 671 F.2d at 754-755.[3]

Allowing for an interpretation of the collective bargaining agreement which is wholly reasonable, the query which is central to the instant controversy is not the rule of past practices as treated by the Third Circuit, but rather the rule of the judiciary in the review of the arbitration award.

Employer's emphasis on the words "accepted by the Union" is illfounded. There is no evidence in the record to support a conclusion that the Union ever accepted such a past practice. In essence, the Employer is asking the Federal Court to modify the language of Article XXVI (B)(1) from "shall be subject to discharge" to "shall be subject to discharge without recourse in the grievance procedure". The Third Circuit, in confirming the arbitrator's award, rejected Petitioner's argument that the Court should impose such a modification on the written provisions of the collective bargaining agreement.

[3] Employer's argument (Petition 9-12) which claims that the Third Circuit opinion mandates express agreement by the parties goes to the merits of the extent to which the past practice was part of the collective bargaining agreement. Resolution of whether the Third Circuit's opinion does call for express agreement would not affect whether the Court was correct in holding that the award could "possibly derive from an interpretation and application of the clauses of the agreement." The argument is thus superfluous and will not be addressed herein.

II. The Third Circuit correctly applied this Court's holding in *United Steelworkers vs. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) in upholding the arbitrator's interpretation of the agreement despite the possibility that the Court's interpretation of the contract could have been different from that of the arbitrator.

Employer claims that the Third Circuit misapplied *Enterprise* when it enforced the arbitration award despite an allegedly erroneous application of principles of contract construction by the arbitrator (Petition 14). Petitioner clearly fails to take into account the language of Enterprise which makes clear that the scope of a reviewing Court does not include an examination of the arbitrator's application of principles of law to his interpretation of the collective bargaining agreement. As this Court stated:

> "The acceptance of this view would be require Courts, even under the standard arbitration Clause to review merits as every construction of the contract . . . (T)he Courts have no business overruling (the arbitrator) because their interpretation of the contract is different from his." *Steel Workers vs. Enterprise Wheel and Car,* 363 U.S. 598-99 (1960).

A reviewing Court investigation into arbitrator's construction of an agreement relative to whether the award draws its essence from the collective bargaining agreement is limited to whether:

> ". . . the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context and any other indicia of the parties intentions; *only where there is a manifest disregard for the agreement, totally unsupported by principles on contract construction and the law of the shop may a reviewing Court disturb the award.*" *Johnson Bronze Co. vs. International Union of AAAIWA,* 621 F.2d 81-82 (3rd cir. 1980) (Court's emphasis), citing *Ludwig Honold Mfg. Co. vs. Fletcher,* 405 F.2d at 1128.

Thus, the Third Circuit correctly applied the holdings of Enterprise when it stated,

> "(i)f the arbitrator's award can possibly derive from an interpretation and application of the clauses of the agreement, the Courts are precluded from refusing his award." *Arco Polymers*, 671 F 2d at 755[3].

a. The Third Circuit correctly refused to overturn the arbitrator's award on the basis of ambiguity and the opinion.

At issue within the agreement are two clauses which dictate standards for the discharge of an employee. See Appendix E, Article XXVI, Section B(1), Article XVI, Section J(1). The arbitrator's opinion cited both sections but did not explicitlv anaylze the relationship between the two in his reinstatement of Mr. Anderson to his position. Neither does the agreement itself make clear the relationship between Sections B(1) and J(1). The opaque nature of the arbitrator's opinion is not a valid basis for the Court to substitute its own interpretation of the agreement. *Enterprise*, 363 U.S. at 598. An ambiguity in an arbitrator's opinion should not be "seized upon to support an inference that he exceeded his authority." *N F & M vs. United Steel Workers of America*, 524 F.2d 756, 759 (3d Cir. 1975), see also *Virgin Islands Nursing Association Bargaining Unit vs. Schneider*, 668 F.2d 221 (3d Cir. 1981).

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[3] The Court even more distinctly stated this principle in another part of the opinion: "To preclude enforcement (of the award), the contract must not permit any inference that the arbitrator could reinstate the employee." *Id* 671 F.2d at 757, N.4.

b. The Third Circuit correctly upheld the arbitrator's interpretation of two clauses pertaining to discharges in favor of the necessity of the company to show "just cause".

The arbitrators decision under the grievant's discharge causes necessarily involved a resolution of the inherent tension between an employee's obligations to show "good and sufficient cause" and the employer's need to show "just cause" for discharge. The Third Circuit review cannot take into account the arbitrator's methodology of resolutions unless there is no rational reading of the contract which could permit reinstatement. The Court, by taking into account the arbitrator's emphasis on the relation between "just cause" and progressive discipline, found the requisite rationality in the arbitrator's finding the need for the employer to show "just cause" independent of the employee showing "good and sufficient cause" in order for the discharge to be valid. *Arco Polymers*, 671 F.2d at 756.

The Petitioner cites cases which are claimed to stand for the proposition that other Circuits faced with the same or similar facts and awards have ruled such awards vacated under *Enterprise*. Each of the Employer's cited cases can be distinguished from the instant case. In *Amanda Bent Bolt Co. vs. International Union, UAAAIWA*, 451 F.2d 1277 (6th Cir. 1971), there was no provision, other than that violated by the employee, which the arbitrator could interpret as providing him with the authority to alter the penalty for the violation. In our case, the two provisions enable an interpretation of proper authority to provide an alternative remedy.

An arbitrator could properly find that while there may have been no "good and sufficient" cause for the absence, a similar lack of "just cause" would allow a reinstatement of the employee.

The case is cited by the Petitioner, *Textile Workers Union of America vs. American Thread Company*, 291 F.2d 894 (4th cir. 1961) and *Truck Drivers and Helpers Union Local 784 vs. Ulry-Talbert Company*, 330 F.2d 562 (8th cir. 1964) while virtually indistinguishable from each other are inapplicable to the instant case. Both cases involve Circuit Court decisions which, in effect, vacated arbitration awards of reinstatement. However, the arbitrators had found the grievant guilty of conduct which absolutely gave the company proper cause to discharge the employee. Such is clearly not the case here. The arbitrator's award found *no* "just cause" for the discharge of Anderson.

In the case of *F. W. Woolworth Company vs. Miscellaneous Warehousemen's Union Local 781*, 629 F.2d 1204 (7th Cir. 1980), *cert. denied*, 451 U.S. 937 (1981), the arbitrator found that a technical violation had been committed by a certain employee. The arbitrator found that the agreement's two provisions relating to discharge which were issued to be ambiguous and he ordered reinstatement. The District Court vacated the award on the grounds that the agreement contained a clause which read "violation of any company rule shall be considered a just cause", as basis for holding that the arbitrator had improperly modified the agreement. Reversing, the Seventh Circuit noted the ambiguity and affirmed the award of the arbitrator relying, in part, on *Ludwig Honold Mfg. Co.*[4] *Supra*, stating:

> "[t]he provisions at issue were somewhat contradictory so it was appropriate for the arbitrator to interpret them and resolve the ambiguity. His interpretation was rational so it should not have been rejected by the District Court." *F.W. Woolworth Company*, 629 F.2d at 1216.

[4] The Court cited its own previous opinion, *Amoco Oil Company vs. Oil, Chemical and Atomic Workers International Union Local 7-1*, 548 F.2d 1288, 1293-94 (7th cir. 1977), *cert. denied*, 431 U.S. 905 (1978) wherein the direct cite to Ludwig Honold can be found.

It is conceded that had the arbitrator found that the grievant was discharged for "just cause" he could not have fashioned a remedy. It is precisely the argument of the Union that the arbitrator did not and could not make a finding that there was just cause to discharge the grievant.

c. The Third Circuit correctly upheld the arbitrator's interpretation of when the discharge of an employee is subject to company discretion.

Petitioner's final argument is that the Third Circuit applied a standard of review which is impermissible under *Enterprise*. It is argued by the Petitioner that it was error for the Third Circuit to uphold the arbitrator's interpretation of the agreement, that the company did not have sole discretion to discharge the employee. (Petition 18-21).

In support of Employer's argument that a Court could not uphold Article XXVI, Section B(1), as non-mandatory, Petitioner cites *Mistletoe Express Service vs. Motor Expressman's Union*, 566 F.2d 692 (10th Cir. 1977).[5] However, *Mistletoe* was distinguished by the Tenth Circuit in a case whose facts more closely resemble those of the instant case. *IAM Local 389 vs. San Diego Marine Construction*, 620 F.2d 736 (10th Cir. 1980). In *IAM vs. San Diego Marine*, there exists a general provision which insured that employees would be discharged only if there was "just cause". It is this clause which gives the arbitrator the authority to apply all of the surrounding facts and circumstances to his interpretation of the contract to determine whether or not discharge is proper. The Tenth Circuit in *IAM vs. San Diego* noted the distinction between the case before it and Mistletoe:

[5] The Third Circuit also notes the disparity between its holding and that of *Mistletoe*. Arco Polymers, 671 F.2d at 756.

> "In [*Mistletoe*], the collective bargaining agreement expressedly stated that a particular form of misconduct ... justified discharge of an employee ... by contract, the agreement in this case does not expresly define [grievant's] misconduct or misconduct that constitutes just cause for firing." *IAM vs. San Diego Marine*, 620 F.2d at 738.

The Third Circuit properly recognized this subtle but critical distinction, when there are two clauses which govern the discharge of an employee, one of which provides for discharge only upon "just cause". It is entirely possible for an arbitrator to hold, as the arbitrator did in the instant case, that a company does not retain complete control over discharges. *Kewanee Machinery Division vs. Local 21, International Brotherhood of Teamsters*, 593 F.2d 314, 317-18 (8th Cir. 1979). The Third Circuit correctly recognized *IAM vs. San Diego* for the proposition that when two interpretations of a clause exist, the arbitrator has the "power to determine *when* the matter is subject to company discretion .... an arbitrator's choice of one or the other ought to be honored." *Arco Polymers, Inc.*, 671 F.2d at 757, *citing, IAM vs. San Diego Marine*, 620 F.2d at 738-739. See also *Timken Company vs. United Steel Workers of America*, 492 F.2d 1178, 1180 (6th Cir. 1974), *distinguishing, Textile Workers Union of America vs. American Thread Company, supra.*

III. The Third Circuit reinforces the standard for arbitration judicial review consistent with this Court's prior decisions.

The contract provisions are such that they may be interpretated so as to permit the award of Arbitrator Wagner. The true reading of Article XXVI, Section B(1), making an employee "subject" to discharge must be read in conjunction with Article XVI, Section J(1) which

states that "employees shall be discharged only for just cause." Article XXVI, Section B(1) does not require discharge where Article XVI, Section J(1). If the mandatory just cause provision did not exist, then the company could freely discharge under Article XXVI, Section B(1). However, there is a specific and unalterable demand under the contract that just cause exist. As such it is wholly possible that, as here occurred, an arbitrator could return an employee to his work even though he had violated Article XXVI, Section B(1), where the company had not met its burden of just cause. Certainly, as alluded to in the arbitration and more directly referred to by the Third Circuit, the impact of progressive discipline on the determination of just cause would be relevant in filling the gap between the Articles.

The contention of the Employer makes clear the soundness of the admonitions of this Court in the Steelworker Trilogy cases. Throughout their appeals to the District and Circuit and even before this Honorable Court, the Petitioner has insisted on arguing the merits of their case.

Employer argues not that there is no meaning which may be attached to the bargaining agreement which would admit to the decision of the arbitrator, an interpretation which Respondent has clearly shown to exist, but rather that Petitioners own version is the better, or "more correct" analysis. To permit such arguments would create a far more devistating impact on the arbitral process than to permit the affirmance of an award which carries no precedential weight. To allow the District Court to find an independent basis for confirming a discharge opens the door to a never ending arbitration case, the antithesis of the needs of modern industrial models. This Court has recently affirmed the policy favoring the finality of arbitration awards. In *United*

Parcel Service, Inc. vs. Mitchell, _____ U.S. _____, 101 S.Ct. 1559 (1981), wherein this Court restates:

> "Given choices present here, and the undesirability of the results of the grievance in arbitral process being suspended in limbo for a long period, we think the District Court was correct when it chose the ninety (90) day period imposed by New York for the bringing of an action to vacate an arbitration award." 101 S.Ct. at 1565. Cf: Michael F. Hoellering, "Finality in Arbitration: How Final?" 34th Annual National Conference on Labor, (1982) Page 119.

Appeals to District Courts render the "final and binding language" of most arbitration clauses a nullity and which certainly removes the final outcome of industrial relations conflicts from the shop to the Courts.

Indeed, the time consumed in seeking a differing interpretation of language from the Courts would render most collective bargaining agreements worthless. Under a contract with a one to three year life span, litigation over varying interpretations could make any meaningful attempt at industrial peace illusory.

Thus, permitting as the Petitioner requests, a review on the merits of arbitration awards where the contract can be construed so as to provide a basis of the award, would destroy the very foundation of the arbitral process, and in the end severely damage the collective bargaining system.

Conclusion

The decision of the U. S. Court of Appeals for the Third Circuit is wholly consistent with the decisions of this Court and other Federal Courts. Petitioner has asserted that the Lower Court's opinion is in conflict with this Court's "Steelworker Trilogy" decisions. Petitioner's emphasis on certain portions of the "Trilogy" is out of context as it applies to the Court of Appeals decision and to the facts of this case. Accordingly, Respondent respectfully prays that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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